TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 153.

THE ARIVACA LAND AND CATTLE COMPANY, APPELLANT,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

FILED SEPTEMBER 5, 1900.

(17,899.)

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1 UNITED STATES OF AMERICA, }
Territory of Arizona. }

Be it remembered that heretofore, to wit, on the first day of March, A. D. 1893, there was filed in the office of the clerk of the court of private land claims, at Tucson, in the Territory of Arizona, by the Arivaca Land and Cattle Company a petition; which said petition is in the words and figures following, to wit:

2 *The Petition of the Arivaca Land and Cattle Company, a Corporation Duly Organized, for the Confirmation of its Title in and to the Aribac Private Land Claim.*

UNITED STATES OF AMERICA, }
Territory of Arizona, } *ss:*

In the United States Court of Private Land Claims.

THE ARIVACA LAND AND CATTLE COMPANY }
vs.
THE UNITED STATES OF AMERICA, N. W. BERNARD, J. W. HOGAN, Salvador Piguitori, Ygnacio Ortiz, Antonio Aguirre, Antonio Cora, Indalcio Aguirre, Pedro Meranda, Jesus Silvas, Francisco Tapio, Charles Weatherington, W. S. McKnight, John Kelner, Ramon Zepedo, Pedro Zepedo, Patsey Powers, Miguel Moreno, Refil S. de Wilbur, J. B. Conti, H. Menager, H. N. Labaree, A. Hemme, —— Suarez, Richard Roe, John Doe, and Anselmo Anselmus. }

Your petitioner, The Arivaca Land and Cattle Company, by C. W. Wright, its attorney, comes and shows:

That it is a corporation duly organized under and by virtue of the laws of the Territory of Arizona.

That it is the owner in fee, holder, and possessor of that certain tract of land lying, being, and situate in the county of Pima and Territory of Arizona, commonly known and described as "the Aribac" grant or private land claim, the same being more particularly hereinafter described.

That it own- in fee, holds, and possesses said lands under and by virtue of a certain instrument in writing, now and hereafter designated as being a grant title, bearing date the 2nd day of July, 1833, duly made and executed by the treasurer general of the State of Sonora, and by and on behalf of the State of Sonora, in the Republic of Mexico, under and by virtue of article II of decree number 70, passed on the 4th day of August, 1824, by the sovereign constituent congress of the United States of Mexico, which article con-

3 cedes to the States of the Republic of Mexico the rents or revenues which by said law are not reserved to the general government, one of which revenues is the vacant lands within the

respective States, which lands by reason thereof belong to such States, for the disposition of which lands under said decree the constituent congress of the State of Sonora and Sinaloa passed a law, numbered 30, bearing date the 20th day of May, 1825, and other decrees relative thereto by other successive legislatures, which decrees are embodied in sections three, four, five, six, and seven of chapter nine of the organic law of the treasury, said law being numbered 26, bearing date the 3d day of July, 1834, and especially the law numbered 30, bearing date the 20th day of May, 1825, then passed by the constituent congress of the then united States of Sonora and Sinaloa.

That under and by virtue of such laws and decrees such proceedings were thereunder lawfully, properly, and regularly had as that the said treasurer general of the said State of Sonora and Sinaloa and the government of the said State of Sonora, by its officers, duly authorized by the laws aforesaid, duly, properly, and regularly and for a good and valuable consideration, to wit, the sum of eight hundred and thirty dollars, and for other good and valuable considerations in said grant title set forth and described, did, on the said 2d day of July, 1833, sell and convey in fee unto Ignatio and Tomas Ortiz the land, hereinbefore mentioned and hereinafter more particularly described, known as the Aribac grant, and duly, properly, and regularly and for a good and valuable consideration, to wit, the consideration aforesaid, and for other good and valuable considerations, as aforesaid.

That the said Aribac grant was instituted in the year 1812, and that on the 10th day of October of said year said described land was by the officers of the Spanish government and by virtue of and pursuant to the authority on them conferred by the Spanish government, offered for sale at public vendue to the highest bidder therefor, and the same was then struck off and sold to one Don Augustin Ortiz, he being the highest bidder therefor at said sale; that the said Ortiz did, upon said land
4 being so struck off and sold to him, pay into the royal treasury of said Spanish government the amount of his said bid and all costs in that behalf incurred, amounting to the sum of seven hundred and ninety-nine dollars five reals and nine grains; that by virtue thereof an expediente was issued for said lands, but the same became lost and has not since been found; that thereafter, to wit, on the 2nd day of June, 1833, Ignacio and Tomas Ortiz, heirs-at-law of the said Don Augustine Ortiz, then dead, became the owners of said land as the sole and only heirs of said deceased, and because thereof did on said day petition the constitutional alcalde of and for that district, setting up and averring the facts aforesaid and praying that the depositions of three witnesses be taken, whereby to prove that said land was settled and possessed from said time in the year 1812 to the time of said petition and as to the landmarks and boundaries thereof; that pursuant to said petition an order was made that said depositions be taken on said land of said three witnesses; that on the third day of June, 1833, said depositions were taken, showing the said land, its boundaries and monuments; that it had been con-

tinuously occupied by said Don Augustin Ortiz until his said decease and from thence until the taking of said testimony by his said two sons as his sole heirs-at-law; that thereafter, to wit, on the 18th day of June, 1833, said Ignacio and Tomas Ortiz did petition the treasurer general of the State of Sonora, by virtue of article 27 of law No. 30, enacted on the 20th day of May, 1825, that said land be in due form granted to them; that on the 21st day of June, 1833, the said treasurer general did, in obedience to article 28 of said law, refer said petition to the government of the State of Sonora, with a statement as to the same; that thereafter the governor of said State did order that said grant be made to said Ignacio and Tomas Ortiz as prayed for by them, as aforesaid; whereupon and by virtue of the premises aforesaid the said treasurer general did make, execute, and deliver said grant, wherein and whereby said land was conveyed in fee, as aforesaid, and the said Ignacio and Tomas Ortiz did pay each and all the expense of said proceedings, amount-
5 ing to the sum of thirty dollars.

That the map hereto attached, marked Exhibit A, and made a part of this petition correctly represents as near as may be the land embraced within the said grant, the boundaries thereof, and where the same is situate.

That the original grant title or instrument of writing by which said title was conveyed and vested, as aforesaid, is not in the possession nor under the control of your petitioner, but *are*, together with other records and papers of said grant, in the possession and custody of the United States surveyor general of the Territory of Arizona, at the city of Tucson; that because thereof said original document constituting and creating said grant, together with transcripts or copies thereof, cannot be herewith presented or delivered, nor can copies of said grant be now furnished, as required by the rules of this honorable court, but that when, by order of this court, the said original title paper is produced your petitioner will furnish the necessary and requisite copies of each of said instruments in the Spanish and English languages.

That under and by virtue of the provisions of the eighth section of the act of Congress approved July 22, 1854, entitled An act to establish the office of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes, and under acts amendatory or in extension thereof or supplemental thereto, the ones then claiming to own said grant, during the fall of the year 1880, in the office of the United States surveyor general for the Territory of Arizona, filed their petition asking for the confirmation to them of said grant, accompanying which said petition were the original title papers of said grant; that thereupon said surveyor general caused said grant to be investigated by one R. C. Hopkins, a duly authorized and competent agent of the United States; that the said surveyor general did, to further enquire into the premises of said petition, hear evidence, which was reduced to writing and is now filed with said papers in his said office, and, all things having been seen and fully un-
6 derstood by him, he did thereupon make his report thereof

to Congress and did therein report that said grant was in all things genuine, valid, and a subsisting grant, and did recommend the confirmation of said grant to the owners thereof, but that no action was taken thereon by Congress or by any authorities of the United States.

That said grant, at the time of the execution of what is known as the "Gads-en treaty," the same being a treaty made and entered into by and between the United States, on the one side, and the Republic of Mexico on the other, the said grant was duly recorded in the archives of Mexico, was then and ever since then has been and now is a valid and subsisting grant of said land, and was and is in all things regular and legal, and did by virtue thereof vest the title in and to said land *and* said grantees.

That your petitioner owns, holds, and possesses said grant under and by virtue of divers and sundry mesne conveyances made by the original grantees, the said Ignacio and Tomas Ortiz, and their grantees to your petitioner, all of which conveyances are on file and of record in the office of the county recorder of deeds in and for the said county of Pima; abstracts thereof your petitioners will furnish and supply to this court at such times and upon such terms as this court may be pleased to direct.

That the said original grantees of said grant were Mexicans of the Republic of Mexico, and that at the time of the making of the said Gads-en treaty the owners of said grant were likewise citizens of the Republic of Mexico.

That all the steps and proceedings taken, had, and made in and about the sale of said land, as aforesaid, were each and all regular, complete, in due and full conformity with the laws, regulations, and customs then in force for the conveyance of land by grant, and vested a perfect and valid title in fee in and to said land in said grantees; that said grantees were at the time said grant was made in the actual possession of said land, using and occupying the same, having theretofore erected thereon the proper monuments, and that
7 said grantees and their successors have continued from thence hitherto and are now in the actual occupation and use of said land and are now seized in fee thereof; that said grant is a complete, definite grant in fee, by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years without good reason, which would subject the tract to adjudication to third parties in the event of their applying to denounce the same; that no forfeiture of said grant has been or is claimed, and no one ever applied to denounce the same, and your petitioner is entitled to a confirmation of said grant in accordance with the metes and bounds set forth in the original surveys and grants of the same.

That the land claimed by your petitioner is all the land embraced within the original survey of said grant to the boundaries established and described therein, and that said land is the land embraced within the accompanying map filed herewith, as aforesaid.

Your petitioner further alleges on information and belief that there are no persons in possession or any part or portion of said land

save the persons made respondents hereto; that said persons so named as respondents herein, except only the United States, possess severally certain of said land and claim and hold the same adversely to said grant and to the said title of your petitioner; that the only claim made by said respondents, in so far as your petitioner is advised and has been informed, is that said grant is void in law.

Wherefore your petitioner prays that the validity of the said title may be enquired into and decided; that the title of your petitioner in and to said land be declared valid and complete, and for such other and further relief as to the court may seem meet and proper in the premises.

(Signed) CHARLES WESTON WRIGHT,
HENEY & FORD,
Attorney for Petitioner.

Endorsed: Filed March 1, 1893. James H. Reeder, clerk, by R. L. Long, deputy clerk. Petition.

And be it further remembered that on said 1st day of March, A. D. 1893, a summons was issued by the clerk and delivered to the attorney for the plaintiff, but said summons has not been returned to the clerk's office.

[Endorsed:] Arivaca. F No. 1.

8 *Answer of U. S. Attorney.*

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Arizona District.

THE ARIVACA LAND & CATTLE CO., Plaintiff,
vs.
THE UNITED STATES ET AL., Defendants. } No. 7.

Comes now the United States, by its attorney, to answer to the petition filed in the above-entitled cause, — says:

That as to whether the allegations contained in said petition are true it has no knowledge or information sufficient to enable it to form a belief, and therefore denies the same and asks that said plaintiff's claim be rejected and the petition be dismissed.

(Signed) MATT. G. REYNOLDS,
U. S. Attorney.

C # 7, F No. 8. Filed in the office of the clerk, court of private land claims, Feb. 27, 1894.

JAS. H. REEDER, *Clerk.*
By R. L. LONG, *Deputy.*

[Endorsed:] No. 7, F No. 8. Answer.

9 UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Arizona District, 1895.

THE ARIVACA LAND & CATTLE CO., Plaintiffs, *vs.* UNITED STATES, Defendant.	No. 7*b*. Aribac Grant.

Answer.

Comes now the United States, and for its separate answer to so much of said petition as it is advised to be answered, says:

That as to whether or not the plaintiff is a corporation duly organized under the laws of the Territory of Arizona it has no knowledge or information sufficient to enable it to form a belief.

It denies that the plaintiff is the owner in fee, holder, and possessor of a certain tract of land situated in Pima county, Arizona, commonly known and described as the Aribac grant or private land claim.

It denies that it owns in fee, holds, and possesses the same under and by virtue of a certain instrument in writing, designated as being a grant title, bearing date the 2nd day of July, 1833, alleged to have been executed by the treasurer general of the State of Sonora by and on behalf of said State, in the Republic of Mexico, under and by virtue of article II of decree No. 70, of the 4th of August, 1824, enacted by the constituent congress of the United States of Mexico.

It denies that said article or any other concedes to the States of the Republic of Mexico the rents or revenues which by law are not reserved to the general government, one of which revenues is the vacant lands within the respective States; which said lands, by reason of said decree, it claims belongs to the States.

That as to whether or not the constituent congress of the States of Sonora and Sinaloa passed a law, No. 30, bearing date the
10 20th day of May, 1825, or other decrees relative thereto by other successive legislatures, which said decrees are embodied in sections 3, 4, 5, 6, and 7 of chapter 9, the organic law of the treasury, being No. 26, dated July 3rd, 1824.

It denies that under and by virtue of said laws the treasurer general of the States of Sonora and Sinaloa and the government of the State of Sonora, by its officers duly authorized by law, duly, properly, and regularly, for a good and valuable consideration, in the sum of eight hundred and thirty dollars or any other sum, did on the 2nd day of July, 1833, sell and convey in fee to Ygnacio and Tomas Ortiz the land before mentioned as the Aribac grant.

It says it has no knowledge or information sufficient to enable it to form a belief as to whether or not said Aribac grant was instituted in the year 1812, or that on the 10th day of October of the same year said land was by the officers of the Spanish government offered for sale at public vendu- to the highest bidder, and that the same was

then struck off and sold to one Don Augustine Ortiz, the highest bidder.

It has no knowledge or information sufficient to enable it to form a belief as to whether said Ortiz paid into the royal treasury of the Spanish government the amount of said bid or any other amount.

Further answering, it says it has no knowledge or information sufficient to enable it to form a belief as to whether upon said sale in 1812 an expediente was issued for said land, or that the same has since been lost or destroyed, but it says that whatever proceedings may have been taken toward procuring said property in 1812, the same was never carried to final title of grant, and the title never passed from the Spanish government.

Further answering, it says it has no knowledge or information sufficient to enable it to form a belief as to whether on the 2nd day of June, 1833, Ygnacio and Tomas Ortiz were the heirs-at-law of said aforementioned Augustine Ortiz, but it denies that they became on his death the owners of said land.

11 It says that it has no information as to whether, on the 2nd day of June, 1833, they petitioned the constitutional alcalde of that district, averring on facts aforesaid, praying that the depositions of three witnesses be taken to prove thereby the said land was settled and possessed from the year 1812 to the time of said petition, and to prove the landmarks, the boundaries thereof, but if the same was done, as alleged, it was without warrant or authority of law and void.

It has no information as to whether the depositions of said three witnesses were, upon the 3rd day of June, 1833, taken, showing the said land, its boundaries and monuments, and that it had been continuously occupied by Augustine Ortiz until his death, and from thence, until the alleged taking of said testimony of said three witnesses aforesaid, by his two sons, but if the same was done, it was without warrant or authority of law and void.

It says it has no information as to whether or not, on the 18th day of June, 1833, Ygnacio and Tomas Ortiz petitioned the treasurer general of the State of Sonora, by virtue of the law of May 20th, 1825, or any other law, that said land be in due form granted to them, or that on the 21st day of June, 1833, said treasurer general referred said petition to the government of the State of Sonora as to the statement of the same, or as to whether the governor of said State ordered said grant to be made to said Ygnacio and Tomas Ortiz, or as to whether said treasurer general, under the proceedings aforesaid, did execute and deliver said grant, wherein he undertook to convey in fee the said land to Ygnacio and Tomas Ortiz, but that if said proceedings were had and taken, the same were without authority of law and void.

Further answering, it says it has no knowledge or information as to whether said Ygnacio and Tomas Ortiz did pay all the expenses of said proceedings, amounting to the sum of thirty dollars, or not, but that if they did do so, the same was in violation and contrary to the terms of the law under which it is alleged said pretended title was issued; and this, that said law before referred to required

that such titles as it authorized to be issued should be gratis, and no law existed for the payment of such fees prior to 1834,
12 and that said payment was evidently made under the provisions of the law of the State of Sonora of 1834, and it pleads that said grant was antidated and not made, if at all, upon the date it purports to have been made.

That as to whether said map attached to said petition correctly represents the boundaries thereof and where the same *is* situated it has no knowledge sufficient to enable it to form a belief.

That as to whether or not plaintiff owns, holds, and possesses said grant under and by virtue of sundry and mesne conveyances made by alleged original grantees, Ygnacio and Tomas Ortiz, and their grantees, it has no knowledge or information sufficient to enable it to form a belief.

It denies that all of said alleged steps and proceedings had and made in and about the alleged sale of said land were each and all regular, complete, and in due and full conformity with the laws, regulations, and customs then in force for the conveyances of land by grant.

It denies that the same if taken vested a perfect or an imperfect valid title in fee or in equity in and to said land to said alleged grantees.

Says it has no information as to whether or not at the time said grant is alleged to have been made the grantees were in possession of the same, using and occupying it, or that they had theretofore erected thereon proper monuments, or as to whether they or their successors have continued from thence hitherto or are now in the actual occupation and use of said land, and denies that they are now seized in fee or in equity thereof.

It denies that said grant is either definitive in fee or equity by way of sale coupled with the conditions that they should not abandon*ed* the same longer than three years for any cause.

It denies that if said grant was made and any rights vested thereunder that the same have not been forfeited, but, on the contrary, pleads that under the provisions of law of the national government of Mexico all persons in possession of lands in the years 1833
13 and 1834 were required to present their titles or claims to the national government for *the* confirmation and examination within the space of six months, and, failing to do the same, was forfeited and abandoned to the government; and it now pleads this failure as an abandonment and forfeiture and a bar of any remedies against the Mexican government or any against the United States.

That as to whether or not the land claimed by the plaintiff is embraced within the original survey of said grant and is correctly set forth by the map filed with the petition, it has no knowledge or information sufficient to enable it to form a belief.

It says it is true that the United States claims said land adversely to the plaintiff.

Further answering, defendant says that said grant appears to have been issued, if at all, by the treasurer general in the year 1833.

It says that said grant had not been properly located prior to the 30th day of December, 1853.

Further answering, it says that pending negotiation of the treaty of Mesilla, which was finally signed on the 30th day of December, 1853, the status of the public lands situated in the Republic of Mexico, and particularly in that portion which was ceded by said treaty to the United States, was declared by lawful and competent authority, on the 25th day of November, 1853, under and by virtue of a decree of said date, wherein it was declared that the public lands were and had been the exclusive property of the nation and never could have been alienated under any title by virtue of decrees, orders, and enactments of the legislatures, governments, or local authorities of the States and Territories of the Republic. Said decree also declared that sales, concessions, or other class of alienations of said public lands that had been made without the express order and approval of the general powers in the manner prescribed by the laws are null and of no value and effect.

Wherefore defendant pleads that the status of the property acquired by the treaty of Mesilla having been declared and
14 determined by lawful authority, to wit, the sovereign and treaty-making power, to be free of any encumbrance, right, or claim by reason of the action of any State, State government, or official, the same was received by the United States under said declaration or decree, free from said claims, and it is not bound by the laws of nations, the treaty of cession, or the act creating this court to recognize the same.

Wherefore it prays that said grant be declared void and rejected and the petition dismissed.

MATT. G. REYNOLDS,
U. S. Attorney.

Filed in the office of the clerk, court of private land claims, March 20, 1895.

JAS. H. REEDER, *Clerk*,
By —— ——, *Deputy*.

15 And be it further remembered that thereafter, to wit, on the 26th day of March, A. D. 1894, before the court, sitting at Tucson, the following order was made:

THE ARIVACA LAND AND CATTLE CO.
vs.
UNITED STATES ET AL. } No. 7.

On motion of Heney & Ford, attorneys for petitioners, leave was granted by the court to file amended petition herein.

And be it further remembered that afterwards, to wit, on the 20th day of March, A. D. 1895, before the court, sitting at Tucson, Arizona, the following proceedings were had:

THE ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES ET AL. } No. 7. Aribac Grant.

By permission of the court, first obtained, the *the* attorney for the United States filed further answer to the plaintiff's petition.

The cause now came on regularly for trial. Rochester Ford, Esq., appeared for the plaintiff, and Matt. G. Reynolds, U. S. attorney, and W. H. Barnes, Esq., of counsel, appeared for the United States and the other defendants.

After a statement of the case by the attorneys for the respective parties, the plaintiff called Ignacio Bonillas as a witness, who was sworn and examined. Certain documents were also submitted in evidence by the plaintiff, and are clearly marked by number and appear among the files of this case. The defendant offered no testimony. After argument by counsel, the matter was submitted to the court for decision and was by the court taken under advisement.

The following is the evidence, both oral and documentary, submitted:

16 In the Court of Private Land Claims, District of Arizona, March, 1895.

THE ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES OF AMERICA. } No. 7.

Transcript of the proceedings had and evidence offered upon the trial of the above-entitled cause, at Tucson, Territory of Arizona, commencing on the twentieth (20th) day of March, A. D. 1895, at 10 a. m.

YGNACIO BONILLAS, a witness called and sworn on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. FORD:

—. State your name, age, and residence.

A. Ygnacio Bonillas. I am a mining engineer and surveyor; my residence is Magdalena, State of Sonora, Mexico.

Q. What education have you had and where, as a civil engineer, and what experience and practice have you had in your profession?

A. I was educated in Massachusetts, at the Boston University of Technology. I took a course in mining engineering and surveying. I have practiced my profession as a surveyor, in land surveying, mining surveying, and surveys of grants, since the year 1883.

Q. In what country or countries?

A. Both in the United States and Mexico.

Q. You are thoroughly familiar with the Spanish language, are you not?

A. Yes, sir; it is my native tongue.

Q. What, if any, official positions in the State of Sonora have you held?

A. I have held several positions there. I have been mayor of the city of Magdalena. I have been prefect of the district of Magdalena. I have been official mining inspector of the district, official examiner of mining and milling machinery, and I have held several other positions.

17 Q. What experience, if any, have you had in surveying land claimed under grants from the Mexican government or State of Sonora?

A. I have made a great many surveys of grants of that nature; a great many, both in Sonora and in this Ter-itory.

Q. Did you ever make any examinations in the city of Hermosillo, State of Sonora, of expedientes of land grants in the archives of the treasury department there? If so, state to what extent those examinations went.

A. I have made several examinations, and have examined a great many of the titles in the treasury of the State, and have taken notes from them.

Q. Did you in the course of those examinations encounter the signature of Jose Maria Mendoza?

A. I have very often seen the signature on documents in the treasury.

Q. Have you at any time seen his signature in the book of Toma de Razon?

A. I think I have.

Q. I hand you a paper from the office of the surveyor general of Arizona, marked "Exhibit A, titulo Aribac," recorded in Journal, vol. 2, page 100, and ask you to examine the signature appended to that document and state whose it is.

A. (After examination.) I believe it to be the signature of Jose Maria Mendoza.

Q. What do you say as to your opinion as to the genuineness of that signature?

A. I think that it is genuine, both from the form and style of writing.

It is stipulated that the document shown to the witness is what it is claimed to be, the original titulo to the Aribac land grant, which was filed in the office of the surveyor general of Arizona, under the provisions of the act of Congress of July 22, 1854, and as -tended by the law of 1870 and amendments.

By Mr. FORD: We now offer in evidence a translation of the original titulo in this case. (Same marked Exhibit "A.")

It is stipulated that the original titulo in Spanish need not be incorporated into the record of this case, as it is agreed that the translation offered in evidence of same is correct.

By Mr. FORD: Plaintiff offers in evidence certified copy of the entry of record of the Aribac grant in the book of Toma de Razon,

existing in the office of the treasurer general of the State of
18 Sonora, at Hermosillo, Sonora.

(Said document was thereupon marked Exhibit "1.")

Plaintiff offers in evidence a translation of the same.

(Said document was thereupon marked Exhibit "2.")

Q. Mr. Bonillas, did you ever make a survey of the Aribac land grant?

A. I did.

Q. Please state when you made that survey and the results of it.

A. I made the survey of the grant in the latter part of February and during February and March of last year, and I obtained an area for the survey within the monuments found and those established by me of 26,508.06 acres.

Q. Now, state in detail how you made that survey.

A. I made it by triangulation. I measured a base line on a level place across the valley and established flags in the four or five monuments and other trigonometrical stations it being necessary to establish. I measured the base line carefully, and then from both ends of it and from all these flags that I established I made observations, and then calculated, and thus formed the net of triangulations to determine the basis of these measurements and distances.

Q. Did you find the place "Old Aribac"?

A. I did.

Q. Where is that located with reference to the map?

A. That is located about a mile and a half northwest from the town of Aribac, along the road,

Q. State, if you please, how you knew that to be the place of old Aribac.

A. I made inquiries about the original settlement of the grant, and people who have lived there and a great many others who have traveled along that road in this country and in Sonora told me that that was about the first settlement, and there are ruins of houses that indicate that there was at one time a settlement there.

Q. Do you now recall what is called for in the title papers as the monument on the north?

A. I do; yes, sir.

Q. What is the monument at that point?

A. The north centre monument is described as being on the top of the "devisadero," which means "lookout hill" or "look-
19 out mountain." It reads, On this side of the Tagito mine. It seems that these directions were being taken from the old Aribac settlement. On this side of the Tagito mine, the devisadero would be towards the south of the Tagito mine. I made inquiries as to that mine and nobody seems to know anything about it. The description in the title papers further says that this "devisadero" borders on the Sierra de Buenavista. Nobody seems to know anything about the Sierra de Buenavista. There is only one chain of mountains to which the title papers can refer; that is known as the Guija mountains.

Q. Did you find there a "devisadero" or pointed hill?

A. I did.

Q. Describe it.

A. There are a number of hills that would answer that description, but there are no monuments on the tops of these hills other than United States locations monuments, which were established not a great many years back. I found one hill which I think and which I believe is the "devisadero" to which the title refers. That hill borders on a chain of mountains, and on its top I found a very old monument, and when you get on the top of that hill you can view the country all around; it is a "devisadero," and there is a monument on it, and it is not a United States official monument.

Q. Is that the "devisadero" which you have indicated on your map?

A. Yes, sir.

Q. Did you locate what is called for as the landmark or monument towards the south?

A. I did. The title papers say that the south centre monument is established on a low hill on this side of the Longorena mine—they are speaking from old Aribac—so the monument must be north of the Longorena mine.

Q. Did you find such a hill as was described?

A. I did. The Longorena mine is a mine that is well known, even to the present time; it is located on the trail that goes from this part of the country to Sonora, and it is well known, and it is so known to the present time; so I went to that mine, and then from there I looked towards the north; and the description further says that this hill where the monument is is situated near a gulch, where there is a rough growth of timber. There is only one gulch—the Marguita gulch. I looked for this monument on both sides or banks of this gulch, and I found a very large old monument on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill, "devisadero." They are nearly in line.

Q. Do you recollect, Mr. Bonillas, the description from the title papers of the monument towards the east?

A. I do. The monument is described as being a "mesquite tree, with a cross cut into it," it being, as the title papers say, up the valley from the spring, and the boundary on the east as the Calaberas mountains.

Q. State if you found anything answering this description.

A. The spring known to be the source of the Aribac creek is about a mile southeast of old Aribac. That is and has been a very well-known spring there. I looked up the valley from that spring, as the title paper says, on both sides of the valley, for a monument that would answer the description. I did not find any monument that would answer the description, and until I got half a mile from a little chain of mountains that run about right angles from the course of the valley on the east, and on the low ground, I found a very large stump of a mesquite tree about two feet and a half in diameter, and from this stump, being in low ground, you cannot see the surrounding country. I think within five hundred feet, ascending from the

north to the valley, there is a very large monument and a very old monument. You can see from this monument—I think you can see the old Aribac ruins and the west centre monument, and they are almost in a straight line, and this monument must have been put there to mark the eastern boundary of the grant, and I took it as such.

Q. Do you remember the monument called for on the west?

A. I do.

Q. Please state.

A. The title says the monument was established upon a lookout hill at the Punta de Agua. I went to the west, to the water or creek that runs there, and at the proper place I found the monument. It is there—a very old one. It is on a very high hill, at the Punta del Agua, and all the points are known by those same names today. It is undoubtedly the west centre monument.

Q. You found the pointed hill, or "devisadero"?

A. Yes, sir; I did.

Q. Do you recollect the description is, "opposite the Sierra de Babuquivari"?

A. I do. The title says that this monument is on this hillock, fronting the Sierra Bacuquivari, and if you stand at the old ruins and look at the west centre monument you will see that it is towards the Babuquivari mountains. The mountains form the background.

21 Cross-examination.

By Mr. REYNOLDS:

Q. Did you ever examine the archives at Hermosillo for this grant?

A. No, sir; I have not. I have not made an examination for the title of the Aribac grant.

By Mr. FORD: We will admit, if the court please, if it is there we cannot find it. We have hunted for it and cannot find it.

Q. Did you make any search for it?

A. No, sir; I did not.

Q. You say you took the calls for this grant from the title papers. What part of the title papers—the patent itself?

A. No, sir; I took it from the testimonio of the surveyor general's office.

Q. Wasn't there attached to that a patent or grant of the Aribac grant?

A. I suppose it is.

Q. Wasn't there a last note or endorsement attached to it?

A. I don't know whether it is or not. I simply took the field-notes of the survey.

Q. Now, look at the last endorsement, signed by Mendoza, and tell me whether or not that is not the final patent or grant.

A. Yes, sir; it is.

Q. That is the original, is it not?

A. Yes, sir; it is the testimonio.

Q. I am speaking now of that part of the endorsement to which I have called your attention, signed by Mendoza—the final patent or grant. That is the original, is it not?

A. I don't know what you mean by "original."

Q. Don't *know* you know what I mean by original?

A. Do you mean the original title?

Q. I mean the extension or grant—the original grant.

A. Yes, sir; this is the original title.

Q. Preceding that and the part that goes before is a copy, is it not—a testimonio?

A. I call the whole document here a testimonio. It is the first copy or the testimonio of the proceedings gone through for the acquisition of this grant—of this title. The testimonio is the title or the first copy issued from the original expediente.

22 Q. Now, that part which precedes what you have indicated as the grant or patent is copied from the original proceedings which are or should be on file at Hermosillo?

A. Yes, sir.

Q. The original history of the proceedings leading up to the final grant is called the expediente, or history of the proceedings?

A. Yes, sir.

Q. Then a copy of that is made and attached to the foot of it is the original grant, and that is delivered to the party as evidence of title?

A. Yes, sir.

Q. Do you find any endorsement in that instrument to the effect that it was recorded in the book of records?

A. Yes, sir.

Q. Does it purport to give the page of the book—where it is recorded?

A. Yes, sir.

Q. Have you had occasion to examine the Toma de Razons of grants, in Hermosillo, especially?

A. Yes, sir; to some extent.

Q. I will get you to state whether it is not the general rule—in fact, the invariable rule—that where you find the record of the grant in the Toma de Razon, and you get the title, you will not find upon it the *the* endorsement of the record and the page given in the endorsement, just as this one is?

A. I cannot say. I don't know.

Q. You have never had occasion to examine as to that question. If you couldn't take the proceedings which are copied from the expediente—if they were gone from that instrument and nothing were left except the final patent signed by Mendoza—could you take this grant and locate it?

A. I could not.

Q. And it is only by reference to the testimony of witnesses taken before the alcalde upon the petition of Tomas and Ygnacio Ortiz, in the titulo or expediente, that you are able to locate this grant?

A. Yes, sir; only those declarations and the field-notes of the original survey.

Redirect examination.

By Mr. FORD:

Q. When you say you could not locate this grant upon the final patent, you don't mean to say you could not locate it upon
23 the testimony and proceedings in the original grant?

A. I say I can. I could not locate the monument on that paper signed by Mendoza, because in making the grant they do not give any description of the monuments or boundaries; they refer to the boundaries as originally established in the surveys and on the declarations of witnesses, as the case may be.

Q. According to the declarations of witnesses and the proceedings in this titulo which you have, you made this survey?

A. I did.

Recross-examination.

By Mr. REYNOLDS:

Q. In the examination of expedientes at Hermosillo, do you find attached to the original expedientes a grant or patent, such as signed by Mendoza, which you have designated as the last note, and the original?

A. Not as a general thing.

Q. You sometimes find an original expediente or borrador of the grant—an unsigned copy?

A. Yes, sir.

Q. Do you know of any instance where you find attached to the expediente *and* full and complete copy of the patent which is attached to the testimonio?

A. I do not remember.

Q. In other words, the expediente remains on file in the archives?

A. Yes, sir.

Q. And (continuing) a copy is made of that, and to that copy is attached the original patent or grant, and a note is made of that grant in the Toma de Razon?

A. Yes.

Q. (Continuing:) That, then, is delivered to the party as evidence of title?

A. Yes, sir.

Q. That is the form of the records at Hermosillo on all regular land grants?

A. Yes, sir.

Q. That's all.

By Mr. FORD: I offer in evidence, if the court please, the deraignment of title filed in this case.

(Said document was thereupon marked Exhibit "3.")

I offer in evidence also the map testified to by the witness.
24 (Said map was thereupon marked Exhibit "4")

Further cross-examination of Witness BONILLAS.

By Mr. REYNOLDS:

Q. What was the area you got, Mr. Bonillas, in your survey?
A. 26,508.06 acres.
Q. How many sitios would that be?
A. About six sitios.
Q. Now, in surveying this property you didn't take into consideration the area granted of two sitios, did you?
A. No, sir.
Q. Did you notice in the title the fact that the area of this grant was two sitios?
A. Yes, sir.
Q. In making your survey you gave that practically no attention?
A. Not at all. I wanted to locate the grant according to the calls and the monuments.
Q. What kind of stone did you find in the monuments that you speak of?
A. The stones that constituted the formation of the country.
Q. You mean piles of stones. Do you think those piles of stone were piled up in 1812?
A. I think they were, from the location of the monuments.
Q. As far back as 1812?
A. Yes, sir.
Q. You think those monuments could not have been built since that time?
A. I suppose they could. The fact that they answer the description, I assume that they are the original monuments.
Q. You say you think they are the original monuments because they conform as near as may be to the description?
A. Yes, sir.

It is admitted, so far as the investigation by the plaintiffs as well as by the Government —, that they have been unable to find the original expediente on file in archives at Hermosillo. I mean either the expediente of 1812 or the expediente of 1833, on which this title is based.

By Mr. FORD:

Q. Will you describe more fully the appearance of those monuments and what, if anything, gave you the impression that they were of great age and might have been built in 1812?
25 A. These four monuments of the Aribac land grant seem to be very old, because the rocks at the base of the monument are almost covered with sand the wind has carried there. Some of the rocks are mossy, and have not been disturbed for many years, and look very much like those I have examined in grants that were made a hundred years or more, in various parts of the State of Sonora—very much like old monuments I have found on grants.

By Mr. REYNOLDS:

Q. The fact that sand is deposited around them is no evidence of age, is it?

A. I think it is.

Q. Sandy country, isn't it?

A. No, sir.

Q. Sand drifts very much through that country, doesn't it?

A. No, sir. There is no sand at all, and that is a fact that shows the great age of the monuments.

Witness excused.

Petitioner rests.

And the Government rests.

Case argued and submitted.

I hereby certify that the above and foregoing ten (10) pages contain a full, true, and correct transcript of the evidence offered and proceedings had upon the hearing of this cause, to wit, the case of Aribac Land and Cattle Co. *vs.* The United States, involving the title to the property claimed as the Aribac grant, in the Territory of Arizona.

LYMAN F. PARKER, JR.,
Official Stenographer.

Tucson, A. T., March 1, 1895.

26 PLAINTIFF'S EXHIBIT "A."

Titulo

Of grant of two sitios of land for raising cattle and horses, which comprise the place called Aribac, situated in the jurisdiction of Pimeria Alta, issued by this treasury general in favor of the citizens Tomas and Ygnacio Ortiz, residents of the presidio of Tubac.

27 [SEAL.]

Sello segundo doce reales. Para los años de 1833 y -834.

Jose Maria Mendoza, treasurer general of the free, independent, and sovereign State of Sonora:

Whereas article 11 of the superior decree No. 70, issued by the General Congress of the Union, dated August 4, 1824, concedes to the States all the revenues which in said decree are not reserved to the federation, and whereas one of said r-venues is that obtained from the lands of their respective (State) districts, which consequently belong to them, and for the disposal of which the law No. 30 of the 20th of May, 1825, was enacted by the honorable constituent congress of the State, then united of Sonora and Sinaloa, as well as other decrees on the subject issued by subsequent legislatures, and whereas Tomas and Ygnacio Ortiz, citizens of Tubac, have instituted proceedings on the legal possession, measurements and

appraisement of two sitios of land for raising cattle and horses in the place called Aribac, in the jurisdiction of Pimeria Alta, which reads literally as follows:

I, Antonio Carrillo, treasurer of Arizpe, State of Sonora, do hereby certify that on page 85 of the manual book corresponding to the year 1812, the following entry is found:

October 10.—Charged seven hundred and ninety-nine dollars five reales and nine grains paid to this royal treasury by Don Jose Carrillo, in the name of and as attorney for Don Augustin Ortiz, a citizen of the presidio of Tucson, in the following manner: 747 dollars and 3 reales as the highest bid for which two sitios of land for raising cattle were recently sold to him at auction by this intendencia, which land comprises the old and depopulated town or settlement called Aribac, situated in the jurisdiction of Pimeria Alta;
28 37 dollars and 3 reales as the royal impost of media annata, and the remaining 14 dollars, 7 reales and 9 grains as the two per cent. of general impost as explained in the order marked No. 329.

8799, 5 rs. 9 gs.

BUSTAMANTE.
ROMO.
JOSE CARRILLO.

[SEAL.]

And that the same may be valid whenever it is necessary and as demanded by the interested party, I issue this certificate in duplicate and on ordinary paper, in default of official paper, at Arizpe, on the 18th of June, 1833.

ANTONIO CARRILLO.

To the constitutional alcalde:

The citizens Tomas and Ygnacio Ortiz appear before you and say that in the year 1812 our deceased father, Don Agustin Ortiz, paid into the treasury of the capital of Arizpe 8747 and 3 reales, as the highest bid for which two sitios for raising cattle were sold to him at public auction, which land is situated in the place called Aribac, we likewise state that we are ignorant as to who was the surveyor or where the expediente containing the measurements, appraisement and auctions is now, but that it is more than probable that it passed through the usual process and it was perhaps either lost or filed in some of the offices through which it had to pass in order that the last requirements might be fulfilled upon it, which is the reason why the title was not issued. We therefore ask of you to have the kindness to order three sworn depositions to be made by as many individuals who are informed thereon, and who will declare if said land has been settled and occupied by the interested parties since that time up to the present, and furthermore whether the landmarks and boundary lines which show its limits are the same that existed then and at the present time at the four cardinal points, and

we further ask of you to turn over to us the orignal testimony
29 when taken, that we may use it for our desired purpose. We swear that we act without malice and to all that is necessary, etc.

TOMAS ORTIZ.
YGNACIO ORTIZ.

TUBAC, *June* 2, 1833.

The above petition has been presented and accepted. Let the informations asked for by the interested parties be taken and returned to them in the original for the ends that may be necessary. Atanacio Otero, constitutional alcalde of this place, thus decreed, ordered and signed the same with assisting witnesses in default of the clerk prescribed by law.

ATANACIO OTERO.

Witness:
GERONIMO DE LA ERRAN.

Witness:
JOSE GRIJALVA.

On the third day of said month and year, I, the acting constitutional judge, being at present at the Aribac ranch, together with the witnesses Lorenzo Carrisosa, Jose Sanchez and Bernardino Madrid, persons who are better informed on the matter at issue, and who at present reside at the presidio of Tubac, about six leagues distant from this place, summoned Lorenzo Carrisosa who, having been sworn as is customary, under which oath he promised to speak the truth in everything about which he was questioned, and having been asked to state whether said Aribac ranch has been settled and occupied by the deceased Don Agustin Ortiz and heirs since the year 1812 up to the present time, and whether the landmarks that designate its boundaries are the same that have existed and do exist

[SEAL.]

today in the four cardinal points, said that from said year 1812 up to his death Don Agustin Ortiz kept said Aribac ranch settled and occupied, and that his sons Don Tomas and Don Ygnacio Ortiz had kept it in the same condition since their father's death up to date; and that concerning the landmark- that designate the four cardinal points, those that I have seen in the examination of the land
30 are the same that have existed upon it without any variation, the one towards the north on the high pointed hill (devisadero) that rises on this side of the Tagito mine and borders on the Sierra de Buenavista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (divisadero) opposite the

Sierra del Babuquivari. He said finally that that was all that he knew and was sure of on that matter; that he resides in the presidio of Tubac and is fifty-five years old. As he did not know how to write, he made a cross with the judge and assisting witnesses in default of the clerk prescribed by law.

ATANACIO OTERO.

Witness:
GERONIMO DE LA ERRAN.

Witness:
JOSE GRIJALVA.

At the same place, and on said day, month and year, I, the acting

[SEAL.]

judge, summoned Jose Sanchez who, having been sworn in the ordinary way, and having promised to speak the truth in his testimony on the aforesaid subject, said that the ranch called Aribac has been settled and occupied from the year 1812 up to the present time by the deceased Don Agustin Ortiz and his successors, Don Tomas and Don Ygnacio Ortiz, and that the landmarks that designate the boundaries that have just been mentioned, on the four cardinal points, and that have since that time designated the limit of their measurements are the same and without variation. This he answered, stating that he was fifty-seven years old and a citizen of Tubac, and as he did not know how to write, he made a cross.

I, the acting judge, signed the same with the assisting wit-
31 nesses in default of the clerk prescribed by law.

ATANACIO OTERO.

Witness:
GERONIMO DE LA ERRAN.

Witness:
JOSE GRIJALVA.

At said place, and on said day, month and year, I, the above-mentioned judge, summoned citizen Bernardino Madrid, who, after having been sworn as is customary and having promised to speak the truth regarding all that he was questioned about as to the previous matter, said that the ranch called Aribac has been settled and occupied since the year 1812 up to the present time by the deceased Don Agustin Ortiz and his successors, Don Tomas and Don Ygnacio Ortiz, and that the landmarks that designate the boundaries just mentioned, on the four cardinal points, are the same and without any variation which since that time have designated the limits of their measurements. This he answered, stating that he was fifty years old and a citizen of Tubac, and not knowing how to write, he made a cross. I, the acting judge, signed said testimony

with the assisting witnesses in default of the clerk prescribed by law.

ATANACIO OTERO.

Witness:
GERONIMO DE LA ERRAN.

Witness:
JOSE GRIJALVA.

The testimony being concluded, it was given in the original to Don Tomas and Don Ygnacio Ortiz, for their benefit and as they desired it; and in order that it may remain as an evidence, I write it and sign it at the Aribac ranch on the 3d of June, 1833, with my assisting witnesses in default of the clerk prescribed by law.

ATANACIO OTERO.

Witness:
GERONIMO DE LA ERRAN.

Witness:
JOSE GRIJALVA.

To the treasurer general of the State:

Ygnacio Elias Gonsales, of this city, in the name of and as attorney for Don Tomas and Don Ygnacio Ortiz, states that he has the honor of inclosing you the documents by which they show their right of property to two sitios of land for raising cattle which in the year 1812 were sold at public auction to their deceased
32 father, Don Agustin Ortiz, from whom they inherited the same, which land is situated in the place called Aribac, and that the price at which it was sold and other imposts thereon have been paid. The interested parties have not up to the present time

[SEAL.]

obtained the grant the original expediente containing the measurements having perhaps been lost. I ask and entreat your honor, in the name of my clients, that, as prescribed by article 27 of law No. 30, enacted on the 20th of May, 1825, you have the condescension to order what is proper and right, and that the corresponding grant be issued so that they can at all times hold their property. I swear that I act without malice and to all that is necessary, etc.

Arizpe, June 18, 1833.

YGNACIO ELIAS GONSALES.

ARIZPE, *June* 21, 1833.

The above has been presented. In compliance with article 28 of law No. 30 enacted on the 20th of May, 1825, I forwarded it to the government that it may be decided upon as is deemed proper. The

treasurer general of Sonora so ordered and signed it with the assisting witnesses prescribed by law.

MENDOZA.

Witness:
RAMON DE LA FUENTE.

Witness:
BARTOLO MIRANDA.

Treasurer general of the State of Sonora.

MOST EXCELLENT SIR: The citizen Captain Ygnacio Elias Gonsales has applied to this office in the name of the citizens Tomas and Ygnacio Ortiz, showing the documents which I have the honor of forwarding to Your Excellency. By said documents the interested parties show that in the year 1812 two sitios of land for raising cattle were surveyed and sold at auction to their deceased father, Don Agustin Ortiz, which land is situated in the place called Aribac in the jurisdiction of Pimeria Alta; that since that time the land has been occupied without any interruption; that there ex-
33 ist today the landmarks placed at that time, and that all dues are paid to the public treasury. Therefore their attorney begs that the corresponding grant be issued, as they have complied in time with article 27 of law No. 30, issued on the 20th of May, 1825. As in compliance with article 28 of the same law, I forward Your Excellency the above-mentioned documents, permit me to state that in my opinion the latter are legal and sufficient, and that there is no objection that should prevent the interested parties from obtaining the grant. Your Excellency will, however, do what is most proper.

God and liberty.
Arizpe, June 21, 1833.

JOSE MARIA MENDOZA.

To the governor of the State:

A copy.
Arizpe, June 21, 1833.

MENDOZA.

No. 940.

Whereas, the possessory right of the citizens Tomas and Ygnacio Ortiz has been legally proved, and the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized, and the principal value of the land has been paid to the public treasury, as is shown by the documents exhibited by their attorney, Captain Ygnacio Elias Gonsales, which documents I return to your honor

[SEAL.]

for the required purposes, the treasury shall therefore order the grant to be issued in favor of the interested parties who demand it,

in accordance with the law. I communicate the same to your honor as an answer to your esteemed note dated yesterday, 21st instant.

God and liberty.

Arizpe, June 22, 1833.

JOSE LUCAS PICO.
JOSE MARIA FELIX,
Second Clerk.

To the treasurer general of the State.

ARIZPE, *June* 24, 1833.

The above has been received, and in due compliance with the preceding supreme resolution let the grant be issued for two
34 sitios of land for raising cattle which comprise the place called Aribac, situated in the jurisdiction of Pimeria, Alta, in favor of the citizens Tomas and Ygnacio Ortiz, notifying their attorney to pay into the treasury the value of the title, in conformity with the laws. The treasurer general of the State of Sonora so decreed and signed the same with assisting witnesses in the ordinary form.

JOSE MARIA MENDOZA.

Witness:
RAMON DE LA FUENTE.

Witness:
BARTOLO MIRANDA.

In these terms this expediente was completed with all the requisites and formalities established by law, and it remains in the archives of this office as a perpetual record.

Wherefore, using the power which the laws concede to me, I do hereby, and in the name of the sovereign State of Sonora, issue in legal form a grant of two sitios of land for raising cattle and horses, which comprise the place called Aribac, in favor of their possessors, Don Tomas and Don Ygnacio Ortiz, citizens of Tubac, upon whom I confer, give and adjudge said land as a sale, with all the qualities, firmness and stability prescribed by the laws, for themselves, their children, heirs and successors, with all its rights, uses, customs, servitudes, timbers, forests, pastures, waters, springs, watering places, and all its other rights; on the positive and definite condition that they are to keep said sitios settled

[SEAL.]

and occupied, without their being deserted for any length of time, and warning them, moreover, that if their total abandonment should take place during three consecutive years, and some person should denounce them, they will, in such case, and after an examination of the fact, be declared public land and sold again to the highest bidder, except in those cases, however, as is just, in which the abandonment

may take place owing to notorious invasions of the enemy,
35 and only during such periods. Said Don Tomas and Don Ygnacio Ortiz, their heirs and successors, are further and strictly

[SEAL.]

advised that they are to keep themselves within the limits of the two sitios, their appurtenances, limits and boundaries individually established in the foregoing expediente, and to observe and exactly comply with article 30, of law No. 30, enacted on the 20th of May, 1825, which law binds them to keep landmarks of stone and lime on their boundaries under penalty of $25. This fine shall be exacted from them by the proper judge and turned into the public funds, should the law be violated, in which case said landmarks shall be built at the expense of the interested parties. And for the sake of the good and prompt administration and the fulfilment of the laws on the subject, I command the present and future judges

[SEAL.]

and local authorities of the district of this capital not to allow said interested parties or their successors to be in any way molested or disturbed in the free use, exercise, property, dominion and possession of the said two sitios of land which comprise the place called Aribac. On the contrary, they shall zealous- and constantly and with the greatest vigilance and activity see that they are protected and always kept in the quiet and peaceable possession of what they have lawfully acquired, so that in this way they may freely sell, change, exchange, donate, convey, cede and alienate said land as they may please and determine and as absolute owners and proprietors thereof in fee. With this understanding I issue this formal grant in favor of Don Tomas and Ygnacio Ortiz, their children,
heirs and successors, giving it to them for their own safety,
36 after being duly recorded in the proper book. Issued in the capital of Arizpe on the 2d of July, 1833. Authorized and signed by me and sealed with the seal of this office by and before the undersigned witnesses who assist me in default of the clerk prescribed by law.

JOSE MARIA MENDOZA.

Witness:
LUIS CARRANCO.

Witness:
BARTOLO MIRANDA.

[SEAL.]

This title is recorded on page 15 of the proper book which exists in this treasury general.

[SEAL.]

Jose Justo Milla provisional treasurer of the State of Sonora. I certify that on page 45 of the manual book of the present year the following entry is found:

4—153

July 12.—Credited to land grants thirty dollars, paid by the citizen Ygnacio Elias Gonsales as attorney for the citizens Tomas and Ygnacio Ortiz, as the value of a land title lawfully issued on the second of July of the present year by this general office in favor of the interested parties for two sitios of land for raising cattle which comprise the place named Aribac in the jurisdiction of Pimeria Alta, and of this payment the proper certificate was issued.

$30.

And that it may stand as a proof wherever it may be necessary, I issue the present at Arizpe on the 12th of July, 1833.

JOSÉ JUSTO MILLA.

Filed in the office of the clerk, court of private land claims, Jan. 16, 1894.

JAS. H. REEDER, *Clerk*,
By R. L. LONG, *Deputy*.

37 OFFICE OF SURVEYOR GENERAL,
TUCSON, ARIZONA, *January* 11, 1894.

I hereby certify that the paper attached hereto is a correct copy of the paper it purports to be a transcript of on file in this office.

[Seal U. S. Surveyor General's Office, District of Arizona.]

LEVI H. MANNING,
U. S. Surveyor General, District of Arizona.

PLAINTIFF'S EXHIBIT 1.

En 11 de Julio se entregó á Don Luis Yberri el titulo de merced espidido en 28 de Diciembre de 1832 de tres citios de tierra para cria de ganado mayor y Caballada que comprende el puesto nombrado Huepare cito en jurisdiccion del pueblo de Santa Maria de Baceraca á favor del ciudadano José Rodriguez de aquella vecindad.

MILLA.

En 12. de Julio se entrego al Capitan Dn. Ygnacio Elias Gonzales, el titulo de merced espedido en 2. de Julio del coriente año, de dos sitios de tierra para cria de ganado mayor y caballada, que comprende el puesto nombrado Aribac, sito en jurisdiccion de la pimeria alta, á favor de los ciudadanos Tomas é Ygnacio Ortiz vecinos del presidio de Tubac.

MILLA.

En 20. de Julio se espidio titulo de merced de un sitio menos cuatro cabellerias de tierra para cria de ganado mayor comprendido en en puesto nombrado San Vicente Ferrer en jurisdiccion de la ciudad de Alamoz á favor del Ciudadano Ygnacio Almada de aquella vecindad.

MILLA.

(C # 7, F 6.) Filed in the office of the clerk, court of private land claims, Jan. 16, 1894.

JAS. H. REEDER, *Clerk*,
By —— ——, *Deputy*.

[Endorsed:] No. 7, F 6. In the court of private land claims, Arizona district. The Arivaca Land and Cattle Company *vs.* The United States *et al.* Certified copy of entry in Book of Toma de Razon. Filed Jan. 16, 1894. James H. Reeder, clerk, by R. L. Long, dep. cl'k. Heney and Ford, attorneys for Arivaca Land and Cattle Company.

38 PLAINTIFF'S EXHIBIT 2.

In the United States Court of Private Land Claims.

ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES OF AMERICA ET AL.

Translation of Entry in Book of Toma de Razon in Office of the Treasurer General of the State of Sonora, at Hermosillo, Sonora, Mexico.

"On the 12th of July (1833) there was issued to Captain D'n Ygnacio Gonzales the title granted on the 2d of July, of the corresponding year, to two sitios of land for raising cattle and horses, which comprise the place named Aribac, situated in the jurisdiction of Pimeria Alta, in favor of the citizens Tomas and Ygnacio Ortiz, residents of the presidio of Tubac.

MILLA."

(C # 7, F 7.) Filed in the office of the clerk, court of private land claims, Jan. 16, 1894.

JAS. H. REEDER, *Clerk*,
By R. L. LONG, *Deputy*.

39 (PLAINTIFF'S EXHIBIT 3.)

In the Court of Private Land Claims.

ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES ET AL. } No. 7. Aribac Grant.

List of Deeds.

December 26, 1856.—Ygnacio Ortiz to S. P. Heintzelman, president of the Sonora Exploring and Mining Company, and his successors, in trust for the stockholders of said company; acknowledged and recorded in office of the recorder of Pima county, Arizona Territory, in old Book 1, pages 14, 15, and 16.

June 7, 1856.—Tomas Ortiz to Ygnacio Ortiz and instrument of April 21, 1857, confirming above instrument; recorded in office of recorder of Pima county in old Book 1, pages 17, 18, and 19.

August 13, 1863.—S. P. Heintzelman and the Sonora Exploring and Mining Company to the Arizona Mining Company; acknowledged and recorded in office of recorder of Pima county in Book No. 1 of Miscellaneous Records, pages 538, 539, and 540.

January 3, 1870.—Arizona Mining Company to Charles D. Poston; acknowledged and recorded in office of recorder — Pima county, Arizona Territory, Book No. 1 of Real Estate, page 558.

David Crawford and Herzog A. Johnson to C. D. Poston; recorded in same office, Book of Real Estate Records, page 561.

February 25, 1882.—C. D. Poston to Charles Silent, conveying five acres of the Aribac tract, embracing the Consolidated Arizona Gold and Silver Mining Company; recorded in same office in Book of Deeds No. 11, page 127.

February 16, 1882.—C. D. Poston to B. M. Jacobs, conveying five acres in a square around the smokestack of the Deere and Townsend mill in the Aribac grant; recorded Book of Deeds No. 11, page 134.

40 September 15, 1882.—C. D. Poston to John S. Carr, conveying one lot 25 feet front by one hundred feet deep in the town of Arivaca and Aribac grant; recorded Book 11 Deeds of Real Estate, page 708.

November 20, 1882.—C. D. Poston to Thomas Fitch, conveying five acres of land in a square of six hundred and sixty feet on each side, enclosing the Aribac mill in Aribac grant; recorded Book 11, page 734.

November 21, 1882.—C. D. Poston and Santiago Ainsa to the Aribac Land and Cattle Company, conveying all their right, title, and interest in said grant; recorded Book 11, page 731.

June 28, 1883.—C. D. Poston to the Arivaca Land and Cattle Company, conveying all his right, title, and interest in said grant and confirming deed last above mentioned; recorded Book of Deeds No. 8, pages 649.

Ygnacio Ortiz died leaving surviving him one son and three daughters, viz., Ygnacio Ortiz, Mariana Ortiz, Ana Joaquina Ortiz, and Anita Ortiz.

Ygnacio Ortiz (son of Ygnacio Ortiz, the grantee) to Santiago Ainsa, conveying two-thirds of his interest in the Aribac grant; recorded Book 11 of Real Estate, pages 172, 173, and 174.

May 1, 1881.—Joaquina Ortiz de Yancy (daughter of Ygnacio Ortiz, the grantee) to Santiago Ainsa, conveying two-thirds of her interest in said grant; recorded Book 11, pages 179, 180, and 181.

Anita Ortiz, now sister Teresa (daughter of Ygnacio Ortiz, the grantee), to Santiago Ainsa, conveying all her right, title, and interest in said grant; recorded Book 11, pages 168, 169, and 170.

February 7, 1881.—Mariana Ortiz (daughter of Ygnacio Ortiz, the grantee) to Jennie Ainsa, the wife of Santiago Ainsa, conveying two-thirds of her undivided interest in said grant; recorded Book 11, page 177.

41 January 26, 1883.—Decree rendered in the district court of Pima county, Arizona Territory, in a suit brought by Ygnacio Ortiz, Joaquina Ortiz de Yancy, and Mariano Ortiz (the three children of Ygnacio Ortiz, the grantee), against C. D. Poston *et al.*, to quiet their title to this grant. The case was tried, and a decree was rendered in Poston's favor, decreeing that said plaintiffs

had no title nor interest in the land, and that Poston's title was good.

Tomas Ortiz died, leaving the following-named sons and daughters: Rosa Ortiz, Jesus Maria Ortiz, Dolores Ortiz, Joaquina Ortiz, Tomas Ortiz, Ygnacio Ortiz, Serafina Ortiz, Magdalena Ortiz, Carmelita Ortiz.

Of these the following-named died without issue: Joaquina Ortiz, Ygnacio Ortiz, Magdalena Ortiz, Tomas Ortiz, Carmelita Ortiz.

December 11, 1880.—Carmena Ortiz, grand-daughter of Tomas Ortiz (the grantee), to Santiago Ainsa, conveying all of her right, title, and interest in the Arivaca grant; proved and recorded in Book 11, pages 303 and 304.

June 3, 1881.—Rosa Ortiz de Carrillo and Josefa Ortiz de Massalita, grand-daughters of Tomas Ortiz, the grantee, to Santiago Ainsa, conveying all their right, title, and interest in the Arivaca grant. Acknowledged and recorded Book 11, pages 175 and 176.

Leora Ortiz, sister of Ygnacio and Tomas Ortiz, married a Salazar, and died, leaving as her heirs the following-named persons: Ana Salazar, Louisa Salazar, Rafael Salazar, and Romana Salazar.

Ana Salazar married Redonda; Romana Salazar married Ortiz.

September 24, 1877.—Ana Salazar de Redondo to Santiago Ainsa; acknowledged and recorded in Book 4, pages 187, 188, and 189.

September 17, 1877.—Rafael Salazar, Louisa Salazar, and Romana Salazar de Ortiz (the other three heirs of Leora Ortiz de Salazar) to Santiago Ainsa, conveying all their interests in the Aribac grant; recorded, Book 4, pages 185, 186, and 187.

42 June 2, 1884.—Santiago Ainsa and wife to Arivaca Land and Cattle Company; acknowledged and recorded in office of recorder of deeds for Pima county, Arizona Territory, in Book 12, Deeds of Real Estate, pages 322, 323, and 324.

November 21, 1882.—Pedro Aguirre to the Arivaca Land and Cattle Company; acknowledged and recorded in Book 12, Deeds of Real Estate, pages 198 and 199.

March 8, 1884.—Thomas Fitch to the Arivaca Land and Cattle Company; recorded, Book 12, Deeds of Real Estate, pages 199, 200, and 201.

November 20, 1882.—Santiago Ainsa to Charles Silent; acknowledged and recorded Book 11, Deeds of Real Estate, pages 733 and 734.

HENEY & FORD,
Attorneys for Arivaca Land and Cattle Company.

Filed in the office of the clerk, court of private land claims, March 18, 1895.

JAS. H. REEDER, *Clerk*,
By R. L. LONG, *Deputy*.

43 PLAINTIFF'S EXHIBIT 4.

(MAP.)

(Here follows map marked page 43.)

44 It is stipulated that the map of the Aribac (or Arivaca) private land claim, surveyed by Y. Bonillas, March, 1894, filed in this cause March 18, 1895, and offered in evidence by plaintiff on the trial of the case, is the map made by said Ygnacio Bonillas and correctly represents the survey made by him of said grant, as testified to by him.

ROCHESTER FORD,
Attorney for Plaintiffs.
MATT. G. REYNOLDS,
U. S. Attorney.

Endorsed: No. 7, F No. 12. Stipulation. Filed in the office of the clerk, court of private land claims, Mar. 20, 1895. Jas. H. Reeder, clerk, by R. L. Long, deputy.

45 United States Court of Private Land Claims.

THE ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES. } No. 7. Aribac Grant.

It is hereby stipulated that plaintiff is the grantee of and successor in interest to the original grantee under the grant "Aribac" claimed by plaintiff, and that the deeds and conveyances by which plaintiff deraigns title need not be copied in the transcript of this case if the same should be by either party appealed.

It is further stipulated that the catalogue of expedientes of lands of the States of Sonora and Sinoloa, which expedientes exist in the archives of the treasurer general of the State of Sonora, which catalogue was printed by the State of Sonora, at Hermosillo, in 1889, contains accurate statements, so far as they go, as to the facts stated in such statements of the contents of such expedientes, and it is further stipulated and agreed that the following statements concerning the following-named expedientes, which statements are taken from said catalogue, are offered in this case by plaintiff and shall be included in the transcript of this case, if such case should be appealed, as part of the evidence of plaintiff.

MATT. G. REYNOLDS,
United States Attorney.
HENEY & FORD,
Attorneys for Plaintiff.

Tucson, Arizona, April 5, 1895.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

46 *Summary or Classification of the Expedientes Existing at Hermosillo, Sonora, Mexico, Prepared by Rochester Ford from the Official Catalogue Issued by the State of Sonora of Such Expedientes.*

Those marked with a star (*) are embraced within the notes or report of Ignacio Bonillas, Esq., which was offered in evidence.
The pages given are those of the official catalogue.

Grants Instituted Prior to the Independence, Carried on, Confirmed, and Final Title Thereon Issued by Intendentes.

* Cuchuta. Page 37. Title issued in 1823.
* Nuestra Señora de los Dolores. Page 70. Registered in 1778; title issued in 1824.
Potrero. Page 75. Denounced in 1817; confirmed September 5, 1822.
* San Elisario (á) El Bamuco. Page 118. Title issued November 12, 1824.

Grants Instituted Prior to the Independence, Carried on under Intendentes, Confirmed, and Final Title Thereon Issued by Commissaries General in the Name of the Mexican Nation.

* Alamo de Sevilla. Page 8. Registered in 1821; title issued in 1825.
* Cieneguita. Page 27. Adjudicated in 1825.
* Cuchilla del Burro. Page 28. Registered in 1817; adjudicated in 1824.
* Chupisonora, Taray, Punta del agua y Veranito. Page 33. Title issued in 1825.
* Encinal. Page 43. Denounced in 1817; title issued November 12, 1824.
* Nuestra Sra. de los Dolores de Cobayma. Page 70. Title issued in 1825.
Ntra. Sra. del Carmen. Page 70. Registered in 1820; title issued in 1824.
* Pilares. Page 87. Registered in 1821; title issued in 1824.
* San Juan del Carrizo. Page 107. Denounced in 1818; title issued January 28, 1825.
* San José de la Noria. Page 119. Registered in 1812; title issued in 1824.
* San Jorge de Baborocagui. Page 124. Registered in 1821; title issued in 1825.
47 * San José de Cagüinagua. Page 124. Registered in 1795; title issued in 1825.
* San José de Tutugueche. Page 125. Registered in 1813; title issued in 1824.
* San Rafael de la Zanja. Page 141. Registered in 1821; title issued in 1825.

*San Juan Bautista de Cochorime. Page 133. Adjudicated in 1824.

S. José de Sonoyta. Page 142. Title issued in 1825.

*Tres Marias. Page 147. Registered in 1820; title adjudicated in 1824.

Grants Instituted Prior to the Independence, Confirmed, and Final Title Thereon Issued by State Authorities.

Animas. Page 4. Registered in 1814; title delivered in 1832.

Agua de las Mesteñas. Page 10. Registered in 1788; title delivered in 1835.

Chanate y Bamori. Page 26. Registered in 1822; title issued in 1833.

Carrizal y San Diego. Page 34. Registered in 1800; title issued in 1834.

Cuchuberachi. Page 38. Denounced in 1822; title issued in 1834.

Iucuribampo. Page 51. Registered in 1810; adjudicated in 1826.

Lo de Rodriquez. Page 55. Registered in 1801; title issued in 1834.

Nuestra Señora de la Asunción del Taray. Page 68. Registered in 1805; title issued in 1833.

Ntra. Sra. del Refugio (á) Los Yaquis. Page 70. Registered in 1820; adjudicated in 1834.

Palos Blancos. Page 77. Registered in 1805; title issued in 1833.

Potrerillo. Page 78. Registered in 1813; title issued in 1850.

Palmar. Page 82. Registered in 1781; title issued 1848.

Pilares (á) Rancho viejo. Page 82. Registered in 1805; title issued in 1850.

Piedras verdes. Page 86. Registered in 1818; title issued in 1834.

San José del Tabelo. Page 96. Registered 1766; title issued in 1833.

Saguaribo. Page 103. Registered in 1818; adjudicated in 1826.

San Antonio de la Cañada. Page 104. Registered in 1813; adjudicated in 1832.

Santa Rosa. Page 105. Registered in 1814; adjudicated in 1832.

48 Subiate. Page 113. Denounced in 1816; title issued May 27, 1833.

San Antonio (á) Aguage. Page 118. Registered in 1821 (month not given); adjudicated in 1833.

*San Ignacio de la Canoa. Page 121. Registered in 1820; adjudicated in 1849.

San José del Palmarito. Page 122. Registered in 1805; title issued in 1835.

San Antonio de las Animas. Page 124. Registered in 1813; title issued in 1833.

S. José de Teopari. Page 325. Registered in 1813; title issued in 1834.

S. Juan de los Lagos (á) El Desmonte. Page 125. Registered in 1812; title issued in 1834.

S. Felipe y Arroyo del Espíritu Santo. Page 135. Registered in 1812; title issued in 1835.

San José de Toicerovavi. Page 145. Registered in 1817; title issued in 1833.

Grants Instituted Prior to Independence, Confirmed, and Final Title Issued Thereon by the Mexican Republic in the Time of the Departments.

Agiabampo y Carazeri. Page 5. Begun in 1805; title delivered in 1841.

Alamo, Sierra de Jarodache y San Juan. Page 8. Registered in 1802; title delivered in 1837.

Bacatete. Page 15. Begun in 1812; adjudicated in 1843.

Carrizal de Tena. Page 25. Denounced in 1819; title issued in 1837.

Chiculisani y Lagunas Prietas. Page 29. Registered in 1805; title issued in 1836.

Cervantes. Page 30. Registered in 1813; title issued in 1838.

Cerrito de la Flojera. Page 34. Registered in 1819; title issued in 1837.

Guateco y Bojute. Page 46. Registered in 1803; title issued in 1836.

Lajitas y Palos Blancos. Page 57. Denounced in 1817; title issued in 1838.

Llano Grande. Page 58. Registered in 1821 (month not given); adjudicated in 1843.

Llano de la Cabeza. Page 59. Denounced in 1819; title issued in 1838.

Macopaco. Page 61. Registered in 1818; title issued in 1842.

Pozito y punta de Agua. Page 76. Registered in 1821 (month not given); adjudicated in 1837.

Plomosas. Page 77. Surveyed in 1798; title issued in 1836.

49 Rodeito y Real viejo. Page 90. Denounced in 1816; title issued May 2, 1837.

San José de Gracia. Page 107. Denounced in 1814; title issued October 27, 1837.

San José de la Nopalera. Page 107. Denounced in 1816; title issued in 1839.

San Juan. Page 108. Denounced in 1817; title issued November 28, 1836.

Sn. Blas y Sn. José de Tosimurito. Page 108. Registered in 1815; title issued in 1837.

San José (á) el Potrero. Page 109. Registered in 1817; title issued in 1837.

San Nicolas. Page 109. Registered in 1814; title issued in 1837.

San Pedro. Page 123. Registered in 1807; title issued in 1839.
San Rafael de la Noria. Page 126. Registered in 1813; title issued in 1837.

Titles Issued in 1822.

San Clemente de Terape. Page 118.

Titles Issued in 1823.

Calabazas. Page 27.

Titles Issued in 1824 (*in Addition to Those Appearing Elsewhere in This Summary*).

Ocuca. Page 73.
* Parra. Page 86. Denounced in 1814; title issued July 6, 1824.
Sanjones. Page 117. Registered in 1816; adjudicated in 1824.
* San Antonio de la Ciénega y la Mora. Page 118.
San José del Cajón. Page 119. Adjudicated in 1824.
* San Rafael. Page 120. Registered in 1822; adjudicated in 1824.
San Ignacio (á) Las Cuervas. Page 121.
San José del Ranchito. Page 125. Registered in 1807; title issued in 1824.

50 *Grants Where Petitions Were Addressed to the Commissary General in the First Instance and Titles Were Issued by Him.*

* Cobachi. Page 41. Registered and adjudicated in 1825.
* San Antonio de Pádua (á) El Poso de Crisanto. Page 105. Denounced in 1825; title issued August 27, 1825.

Grants Instituted After the Independence, and Before 1825, *Before Intendentes, Subdelegates, and Others, Carried on, Confirmed, and Final Title Thereon Issued by the Commissary General in the Name of the Mexican Republic.*

* Batana. Page 15. Registered in 1822; title issued in 1825.
* Baviso. Page 15. Registered in 1821; title issued in 1824.
* Corideguachi. Page 27. Registered in 1822; title issued in 1825.
* Higuera. Page 48. Registered in 1821; adjudicated in 1825.
* Merced de las Flores. Page 61. Title issued in 1824.
* Potrero. Page 76. Registered in 1822; adjudicated in 1825.
* Padercitas. Page 76. Registered in 1822; adjudicated in 1824.
Palmillas. Page 76. Adjudicated in 1825.
* San José del Cabrizo. Page 105. Registered in 1823; adjudicated in 1825.
* San Antonio del Alamito. Page 118. Registered in 1823; adjudicated in 1824.
San Felipe de Toyvapa. Page 119. Registered in 1823; adjudicated in 1825.

*San Francisco Javier (á) La Palma. Page 119. Adjudicated in 1824.

*S. José del Potrero. Page 119. Registered in 1822; adjudicated in 1825.

*San Juan Nepomuceno (á) El Corral de Arvizu. Page 120. Title issued in 1824.

San Juan Nepomuceno (á) La Paloma y Aguila. Page 120. Registered in 1823; title adjudicated in 1825.

San Rafael de Juriquipa. Page 120. Registered in 1822; adjudicated in 1825.

*Santa Ana. Page 120. Registered in 1822; adjudicated in 1825.

Su. José de Nator y S. Ignacio de Loyola. Page 131. Registered in 1822; title issued in 1825.

51 *Tebisco. Page 147. Registered in 1822; adjudicated in 1824.

*Viejo (á) De lo de Salvador. Page 155. Registered in 1822; adjudicated in 1825.

Grants Instituted, After the Independence and Before 1825, Before Intendentes, Subdelegates, and Others, Carried on, Confirmed, and Final Title Thereon Issued by the Treasurer General of the State of Sonora.

Animas (á) Los Chinos. Page 4. Registered in 1822; adjudicated in 1831.

Corral viejo. Page 27. Registered in 1822; adjudicated in 1833.

Ciénega. Page 27. Registered in 1822; title issued in 1834.

*San Miguel de la Huerta. Page 96. Registered in 1824; title issued in 1333.

San Benito (á) La Palmita. Page 118. Registered in 1824; adjudicated in 1833.

San José del Chicural. Page 119. Registered in 1822; adjudicated in 1832.

Vallecitos. Page 155. Registered in 1822; title issued in 1833.

Grants Instituted, After the Independence and Before 1825, Before Intendentes, Subdelegates, and Others, Carried on, Confirmed, and Final Title Thereon Issued by the Mexican Republic in the Time of the Departments.

Casa Colorada. Page 27. Registered in 1822; adjudicated in 1837.

Pozo de Crisanto. Page 83. Registered in 1824; title issued in 1837.

Santa Rosa (á) La Poza. Page 120. Registered in 1824; adjudicated in 1837.

Grants Instituted Before State Officials, Carried on, Confirmed, and Final Title Thereon Issued by the Mexican Republic in the Time of the Departments.

Agua prieta, Naynadivacachi y Santa Bárbara. Page 8. Registered in 1835; title issued in 1836.

Alisos. Page 9. Registered in 1828; title issued in 1836.

Arrieros. Page 11. Registered in 1835; title issued in 1837.

52 Baviso. Page 17. Registered in 1833; title issued in 1836.

Cañada del Valle del Sonora. Page 23. Registered in 1823; title issued in 1837.

Cerro Colorado y Nacapulito. Page 34. Registered in 1834; title issued in 1836.

Cajón y Tubaco. Page 39. Registered in 1835; title issued in 1837.

Jesus Maria. Page 53. Registered in 1834; title issued in 1837.

Jusibampo. Page 54. Registered in 1834; title issued in 1838.

Llano Blanco. Page 58. Registered in 1830; title issued in 1837.

Mesa del Alamito. Page 66. Registered in 1835; title issued in 1836.

Obispo. Page 72. Registered in 1830; adjudicated in 1837.

Parida. Page 81. Registered in 1825 (month not given); title issued in 1837.

Paredones y San Juan Bautista. Page 83. Registered in 1835; title issued in 1837.

Palma. Page 83. Registered in 1835; title issued in 1837.

Potrero. Page 84. Registered in 1835; title issued in 1837.

Pozito. Page 84. Registered in 1835; title issued in 1836.

San Antonio. Page 95. Registered in 1833; title issued in 1841.

Seri. Page 103. Registered in 1826; adjudicated in 1838.

Sierra de S. José. Page 114. Registered in 1834 (month not given); title issued in 1836.

San José (á) La Angostura. Page 114. Registered in 1834; title issued in 1836.

S. Juan de Madrid. Page 115. Registered in 1830; title issued 1838.

S. José de la Mesa. Page 116. Registered in 1832; adjudicated in 1837.

Sendraditas. Page 127. Registered in 1835; title issued in 1838.

San José de los Angeles. Page 131. Registered in 1828; title issued in 1836.

Sn. Fernando de la Casita. Page 135. Registered in 1834; title issued in 1837.

San Juan Bautista de la Tierra Prieta. Page 135. Registered in 1835; title issued in 1837.

San Pedro del Almagre. Page 135. Registered in 1835; title issued in 1837.

Sovechi. Page 136. Registered in 1835; title issued in 1837.
53 Saucito. Page 139. Registered in 1834; title issued in 1837.
S. José de Taribuci. Page 139. Registered in 1834; title issued in 1837.
S. Luis (á) El Saucito (en el Picacho). Page 139. Registered in 1834; title issued in 1837.
Tienda Pintada. Page 147. Registered in 1830; adjudicated in 1837.

Grants Instituted under the Departments, Carried on, Confirmed, and Final Title Thereon Issued by the State Officials.

Batea. Page 15. Registered in 1836; title issued in 1849.
Bomi. Page 16. Denounced in 1842; title issued in 1847.
Chiltepines. Page 26. Registered in 1844; adjudicated in 1847.
Cascarita. Page 31. Registered in 1838; title issued in 1852.
Madera y Ventana. Page 65. Registered in 1843; title issued in 1850.
Pillado el Grande. Page 76. Registered in 1839; adjudicated in 1849.
Sàric. Page 117. Registered in 1839; adjudicated in 1848.
S. Antonio de Iturbide. Page 128. Denounced in 1841; title issued in 1848.
San Francisco. Page 129. Denounced in 1847; title issued in 1849.
Todos Santos (á) Los Muertos. Page 151. Registered in 1836; title issued in 1852.

Grants Issued by the State of Sonora.

These are far too numerous to set out in detail. The official catalogue shows more than 180 of such titles, issued in the various years as follows: In 1826, one; 1828, three; 1830, ten; 1831, fifteen; 1832, sixteen; 1833, forty-three; 1834, twenty-six; 1835, twenty-one; 1848, nine; 1849, five; 1850, eleven; 1851, four; 1852, sixteen.

C 7, F. Filed in the office of the clerk, court of private land claims, May 28, 1895.

JAS. H. REEDER, *Clerk*,
By —— ——, *Deputy*.

54 *Amended and Supplemental Petition.*

In the Court of Private Land Claims, Arizona District.

ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES ET AL.
} Arivaca Land Grant.

Comes now The Arivaca Land and Cattle Company, petitioner herein, and by leave of court first had and obtained files this its amendment and supplement to its petition heretofore filed, praying for the confirmation of the Arivaca land grant, and petitioner avers that prior to the treaty known as the Gads-en treaty no resurvey of said grant had ever been applied for or ordered by any one, and that neither of the grantees or their successors in interest had prior to said treaty any knowledge or notice that within the said monuments there was any excess of land over the area stated in said title papers, and petitioner avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale, as recited in said title papers, did not, as petitioner avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers, without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from it for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum due therefor is ascertained.

Wherefore petitioner now tenders to the United States of America and offers to deposit with the clerk of this honorable court, for the United States of America, the sum of three hundred dol-
55 lars ($300), in gold coin of the United States of America, as payment for all such overplus or surplus of said lands in said grant, according to their quality and the price which governed when it was surveyed and appraised, and the further sum of two hundred dollars ($200), in like gold coin, for the costs of ascertaining and determining the existence or non-existence of such overplus, and prays that this court order the clerk of said court to accept said sum as such tender, and, as aforesaid, offers to pay said amount or any amount which may by this honorable court be adjudged to be due for such overplus or surplus, and prays that upon said payment this honorable court decree that petitioner is entitled to and is the owner of all of said tract of land as originally surveyed, including said overplus or surplus, and that by said decree it be secured in the

ownership and possession of the whole of said tract; and petitioner prays that the validity of its said title may be inquired into and decided, and that its title to all of said lands be declared valid, and that the said grant be adjudged to be and always to have been a complete and perfect and unconditional title in fee, and that petitioner be adjudged to be the owner in fee thereof, and for such other and further relief as to the court may seem meet and proper in the premises.

ROCHESTER FORD,
Attorneys for Petitioner.

Filed in the office of the clerk, court of private land claims, Feb. 13, 1899.

JAS. H. REEDER, *Clerk*,
By R. L. LONG, *Deputy*.

56 And be it further remembered that afterward, to wit, on the 25th day of January, A. D. 1899, the same being the 8th day of the January term, 1899, the court, sitting at Tucson, Arizona, the following order was made:

THE ARIVACA LAND AND CATTLE COMPANY
vs.
UNITED STATES ET AL. } No. 7. Aribac Grant.

It was ordered by the court that the submission of this case to the court for decision on March 20th, 1895, be, and the same is hereby, set aside.

(Minutes signed.)

JOSEPH R. REED,
Chief Justice.

And be it further remembered that afterward, to wit, on the 9th day of February, A. D. 1900, before the court, sitting at Tucson, the following proceedings were had:

THE ARIVACA LAND AND CATTLE COMPANY
vs.
UNITED STATES ET AL. } No. 7. Aribac Grant.

This cause came on for further hearing. Rochester Ford, Esq., appeared for the plaintiff and Matt. G. Reynolds, U. S. attorney, and W. H. Pope, assistant U. S. attorney, appeared for the United States.

Witnesses H. O. Flipper, Chas. Bent, J. W. Bogan, N. W. Bernard, and R. N. Leatherwood were called by the defendant-, sworn, and examined.

G. J. Roskruge was called, sworn, and examined by the plaintiff, after which the evidence closed, and the case was submitted to the court for decision.

The following is the evidence, both oral and documentary, offered at this hearing of the cause:

57 In the U. S. Court of Private Land Claims, February Term, A. D. 1900, Tucson, Arizona.

THE ARIBACA LAND AND CATTLE COMPANY, Plaintiff,
versus
UNITED STATES ET AL., Defendants. } No. 7.

On February 9th, 1900, the above-entitled case was called up for trial and the following proceedings were had therein in open court:

Appearances.—Mr. Rochester Ford appeared for the plaintiff; Mr. Matt. G. Reynolds, U. S. attorney, and Mr. William H. Pope, assistant U. S. attorney, appeared for the Government; Mr. W. H. Barnes appeared for other defendants.

Mr. POPE: We desire to present in evidence this report of Special Agents Tipton and Flipper, so far as it bears on this grant, found at page 100 of said report. (Marked Defendants' Exhibit No. 1.)

HENRY O. FLIPPER, sworn on the part of the defendants, testified, upon direct examination by Mr. Pope, as follows:

Q. State your name, residence, and profession.

A. My name is Henry O. Flipper; residence, Nogales, Arizona; civil engineer by profession. At the present I am employed as special agent for the Department of Justice, assigned for duty to the office of the U. S. attorney for the court of private land claims.

Q. Were you so employed during the — 1899?

A. I was.

Q. Are you acquainted with what is known as the Aribaca grant?

A. I am.

Q. Pending now in this court for trial?

A. I am.

Q. In that capacity did you make an examination of the Aribaca grant?

A. I did. I made an examination on the ground in November, 1899.

58 Q. Are you acquainted with the Spanish language?

A. I am.

Q. On this examination of the Aribaca grant did you have with you a copy of the Spanish grant presented in evidence by the claimants on a former trial of this case?

A. I did, and also a translation.

Q. Did you have with you any maps or plats showing former surveys of the grant?

A. I had a map of that grant made by Ignacio Bonillas; also a map made under the direction of the surveyor general of Arizona, by Mr. Roskruge, I think.

Q. Did you have Mr. Howe's map?

A. There is no Howe map, but Mr. Ouray's map.

Q. The maps you had along were filed in this cause?

A. Yes, sir; the map made by Mr. Bonillas.

Q. That was tendered in evidence in connection with his testimony in behalf of the claimants at a former trial of this grant?

A. It is the same map.

Q. Now, I will get you to state whether or not you went to the monuments named on this map of Mr. Ygnacio Bonillas, as surveyed by him March, 1894.

A. I went to the one indicated on that map as the north center monument, the east center monument, the south center monument, and the west center monument. These monuments were shown to me by Mr. Leatherwood.

Q. Do you understand he was on this survey with Mr. Bonillas?

A. He told me so.

Q. Were these monuments that he pointed out to you on your examination, as stated by him, the same monuments or not that he went to with Mr. Bonillas?

A. He told me that they were the same monuments that Mr. Bonillas went to with him.

Q. I will get you to state what, if any, marking these monuments had.

A. The east center monument had A. E. Cent. Mt., meaning
59 Aribac east center monument. The south center monument had A. S. Cent. Mt., meaning Aribac south center monument. The west center monument had A. W. Cent. Mont., meaning Aribac west center monument. The north center monument had A. N. Cent. Mont., meaning Aribac north center monument. These letters in these four cases were cut in the rock.

Q. When you speak of monument, what do you mean? Describe to the court.

A. These monuments of which I speak are piles of stones—stones piled up.

Q. Now, I will get you to refer to the titulo tendered in evidence in this case, and to that portion of the titulo describing the monument on the north, and state what you found there with respect to the positions of these four monuments.

A. (Reads:) "That to the north being on a high lookout hill (devisadero), which is this side of the Tajito mine, and is bounded by the Buenavista mountains."

Q. Did you make any investigation on the ground with a view of locating that monument or find natural objects?

A. Yes, sir; I went to the monument selected by Mr. Bonillas and found that monument on a ridge northwest of the present village of Aribac.

Q. About how far northwest?

A. About two miles or two miles and a half. It is on a high ridge, the northern extremity of the Guijas mountains. This monument is a low pile of stones. There are two piles of stones, each about 18 inches high and four feet in diameter.

Q. Did you take a photograph of that monument?

A. I did.

Q. I wish you would identify that.

A. This is it (photograph marked No. 2).

Q. What is the appearance of that monument on the ground, as to being artificial or natural?

A. It is artificial. There is an outcropping from the top of the hill, and this monument is built by the side of it, and the letters A. N. Cent. Mont. are cut on the outcropping as it sets up by the side of the monument. It looks as if the stones might have been broken from this outcropping and is evidently an artificial monument.

60 Q. How far are they apart?

A. They are five or six feet apart.

Q. State if this monument conforms with the statement of the expediente.

A. The titulo says that this north monument is on a lookout hill and bounded by the Buenavista mountains. This monument is not on a lookout hill; it is on a ridge, on the north side of the Guijas mountains, and the titulo says the Buenavista mountains are on the north side. I do not think Mr. Bonillas' monument conforms to the titulo, for the reason that it is not located on a lookout hill. This range of mountains is a series of peaks, and I think that — the extreme southwestern point of this range there is a hill that stands out by itself, very high, and from the top of this hill you can overlook the whole valley.

Q. Where is that peak on this map of Mr. Bonillas?

A. The peak to which I refer is monument No. 5, now known as Telegraph hill.

Q. What is the Spanish for lookout hill?

A. Devisadero, and that means a hill from which you can look out.

Q. What is the significance of it?

A. I know that in many places they were exposed to the Indians—the mining camps were exposed to the Indians—and some remained on these high points to watch for the Indians while the others were working in the mines and fields, and from this hill a man could see the entire Aribac valley.

Q. Can you look out over the Aribac valley from Mr. Bonillas' monument?

A. No, sir; you cannot.

Q. This Tajito mine that is mentioned in the title papers, did you get any information in that locality as to the location of that mine?

A. *Yes*, sir; I asked a good many people as to where that mine was, and no one ever heard of it nor knew where it was. I traveled all over that entire range of mountains and never heard of it. There might be an old shaft or open cut or tunnel, or something of that kind.

Q. Are there any old cuts in any of the elevations there?

61 —. There are quite a number of cuts. Nearly north of the present town of Aribaca there is a mine that I was told Mr. Unthank opened about 1880. He had driven a tunnel into the foot of the hill—into this mountain. Near the top of this hill there was quite a large dump there, and from this dump four or five mezquite trees, from six to eight inches in diameter, were growing, which had grown there since this dump had been made, judging from their size. This cut is also in line with the devisadero now known as Telegraph hill—United States location monument No. 5.

Q. And the north center selected by Mr. Bonillas, where would that be with respect to that Tajito mine?

A. It would be beyond the Tajito mine; this side.

Q. This side with respect to what place?

A. To Old Aribac; the point marked as Old Aribac.

Q. The title papers say something, do they not, about the north boundary of this grant being bounded by the Buenavista mountains?

A. Yes, sir.

Q. If the grant was bounded by the Buenavista mountains, this monument of Mr. Bonillas would be outside of the grant, as shown by Mr. Bonillas' map, and the entire range, as shown by that map, would be outside?

A. Yes, sir; the greater part of the range would be outside.

Q. Are there other devisaderos in that range of mountains, except in Mr. Bonillas' survey?

A. Yes, sir; there are several. There is one marked Red Hill, and the other is called Telegraph hill. There are two or three sharp peaks that we call devisaderos.

Q. Mr. Bonillas' north center monument is, I understood you, on a large ridge?

A. Yes, sir.

Q. Now, on this devisadero that you spoke of now as Telegraph hill, is there any monument on it?

A. There is a large monument on it, United States location No. 5.

Q. Have you any personal knowledge as to when that was put there?

A. No, sir.

62 Q. Did you go to the east center monument of Mr. Bonillas' survey?

A. I did.

Q. What is the description in the title papers as to that east center monument?

—. (Reads:) "That to the east up the valley from the spring, at a mezquite tree, which has a cross, and is bounded by the Calaveras mountains."

Q. Were you able to find the Calaveras mountains?

A. I made inquiry as to where they were, and no one there knew them by that name; that range of mountains is known as the Pajarito mountains.

Q. Now, I will get you to read to the court the description in the title papers as to that east center monument again.

A. (Reads:) "That to the east up the valley from the spring, at a mezquite tree, which has a cross, and is bounded by the Calaveras mountains."

Q. Now, what do you say as to Mr. Bonillas' east center monument conforming to that description?

A. Mr. Bonillas' east center monument is on the edge of a mesa about one quarter of a mile north of the Aribac valley; it is about midway between two black-oak trees; one of these trees stands north and the other south from the monument; the north one is 18 inches

in diameter and the south one is 20. The monument is 24 inches high and 5-foot base. The title papers say this monument is up the valley from the spring. This monument is a quarter of a mile out of the valley, and north of it, and about four miles southeast from the spring. There is no mezquite tree near the monument. There are three mezquite stumps standing five or six feet high and about two hundred yards northwest from the monument. There is no cross or any mark of any kind on either of these three stumps. The center mezquite stump is 200 yards still further out of the valley than the monument is.

Q. From your knowledge of the country and the vegetation in this country, what would you say as to the growth of these oak
63 trees; how do they compare in size with the mezquite stumps?

A. They are both larger.

Q. Now, you spoke of there being a pile of stones near these oak trees. Have you a photograph of that pile of stones?

A. Yes, sir; I have two photographs, numbers 1 and 2; number 1 is a photograph of the pile of stones showing the oak tree to the north of it, and number 2 shows the pile of stones with the tree south of it. They are both marked; number 1 is marked Defendants' Exhibit No. 3, and number 2 is marked Defendants' Exhibit No. 4.

Q. This pile of stones that you discovered and photographed I will get you to describe it to the court, as to its appearance as to age or otherwise?

A. It is a monument about 2 feet high and about 5 feet in diameter at the base; it lies nearly on the surface; none of the stones are in the ground; in fact, I removed the entire monument and dug into the ground and replaced the monument. It is a modern monument.

Q. Is this the only monument in that locality?

A. No, sir; about a hundred yards south of this monument is another pile of stones on that same mesa and about the same size, and about fifty yards southwest of that still another, and another about three hundred yards from it, and about a hundred and fifty yards north of the Aribac creek is another pile of stones. On the south side of the Aribac creek, along in the southern direction, I counted thirteen piles of stones within a distance of three or four hundred yards. The most northern one of them, no doubt, was built by some surveyor to hold a flag-pole. The first large monument from the south has a big pole, 4 to six inches in diameter, placed in the ground on the west side and about 4 feet from it. There is no mark on this pole, and I do not know what it was put there for.

Q. Is there anything to indicate what these other piles of
64 stones were located for?

A. Nothing, except the most southern of the thirteen of the piles belonged to a section of the Government survey.

Q. What would you say generally about the existence of piles of stones throughout the Aribac valley or in that vicinity? Did you make any observation as to that?

A. Yes, sir. Almost every ridge has one or more piles of stones upon it, especially on the south side of the creek, and throughout those mountains there are piles of stones. You can stand on any prominent point and count a hundred monuments; they are undoubtedly monuments of mining claims.

Q. Was there anything peculiar in these piles of stones that Mr. Bonillas refers to in his survey?

A. Nothing except the fact that they have been built up, piled up, high.

Q. Piled up anciently or recently?

A. They are loose stones, and they must have been piled up recently; they would not be loose if they had been piled up any great length of time.

Q. Describe the north center monument located by Mr. Bonillas, as to its appearance and age.

A. It is on the top of a ridge where there is an outcropping of stone, there being stone all over the ridge, the entire length. All around this pile of stones there are other loose stones along on the ridge.

Q. Any appearance of age about the monument?

A. No, sir.

Q. Did you go to Mr. Bonillas' south center monument?

A. Yes, sir.

Q. I will get you to read to the court the description of the south center monument as given in the grant papers.

A. (Reads:) "That to the south this side of the Longoreña mine, on a small, low hillock (loma), near a valley full of trees."

Q. Did you make inquiry as to the Longoreña mine?

A. Yes, sir.

Q. What did you ascertain?

A. I suppose that that is the mine on the south side of the Aribac creek. I was told that that mine was located in 1877 by a
65 man named —— ——. I asked a number of people if they knew of the mine that existed in 1833, and I could not find any one who knew it until this man, —— ——, located it under that name in 1877 or 1878.

Q. The title papers says it is "on a small, low hillock (loma) near a valley full of trees." Is that a fact?

A. On the south side of the Aribac river there are lomas and on the Yellow Jacket wash; there are lomas the entire length of the valley.

Q. It says a loma near a valley full of trees.

A. Yes, sir; there are trees along this valley its entire length.

Q. Water in this valley?

A. Yes, sir; there was water in it last November, in nearly the whole valley.

Q. What other valley is there coming from the Aribac creek from the south side?

A. A valley known as the Yellow Jacket valley joins the Aribac valley near the present village of Aribac, on the south side. It is not shown on this map. There is a double valley joins the Aribac

valley, and there is a road that runs through the Yellow Jacket valley.

Q. Along the Yellow Jacket valley are there lomas and trees?

A. There are trees in the valley and lomas on both sides of it.

Q. What is the Spanish for hillock?

A. Loma.

Q. What as to piles of stones on that south side, along these washes and lomas; is there just one pile of stones that Mr. Bonillas has identified as the south center monument?

A. No, sir; there are piles of stones all along the wash; there are several piles of stones, but only one has been built up.

Q. What is the appearance of its being built up; does it appear to have been anciently built up?

A. It does not; no, sir. This monument is built of slabs, slab rocks, large slabs, and piled up on top; there is nothing whatever to indicate age.

Q. Was this slab brought there?

A. It is right there; the whole country is covered with
66 this slab rock.

Q. Did you take photographs of this south center monument?

A. Yes, sir; numbers 3 and 4.

(Marked Defendants' Photographic Exhibits 5 and 6.)

Q. On the south side of the Aribac river, between that and the Bonillas south center monument, what is the character of that country, as to being mineral or non-mineral?

A. It is non-mineral until you get to the south line of the grant.

Q. You have been in this country quite a long time?

A. I have been in here since 1885.

Q. Do you know any reason why other piles of stones are found over this country in various places?

A. In these title papers, in the certificate of payment dated in 1812, it was stated to be an abandoned mining camp.

Q. Are there any other considerations why piles of stones are found at various places over this southwestern country besides mining claims?

A. The Indians have built up piles of stones in prominent places to indicate to the coming parties the direction they were going. There are a great many such piles of stones throughout the country.

Q. Have you ever seen piles of stones in sections where no land grants and no mining camps ever had been?

A. Yes, sir; in this Pajarito range, somewhat south of this, there are large piles of stones in the passes.

Q. Did you go to the west center monument as located by Mr. Bonillas?

A. I did.

Q. What is the description in the title papers?

A. (Reads:) "And that to the west as far as the point of water on a lookout hill (devisadero) in front of the Babuquivari mountains."

Q. How is that west center monument marked?

A. A. W. Cent. Mont., meaning Aribac west center monument, and it is on a high hill on the south side of the Aribac river.
67 The monument is 3 feet high and 6 inches in diameter at the base.

Q. What was its appearance as to age?

A. It was recent. That is shown by the fact that no moss is in the letters or nothing of that kind over the cuttings.

Q. Was the lettering in Spanish or English language?

A. English.

Q. Did you go to the point of the water where it ceases to flow?

A. Yes, sir.

Q. Is it at the place where Mr. Bonillas stated it was?

A. No, sir; on November 18th, 1899, I was at the point of water. It is about a mile and a half up the creek from the place where it was marked on the map.

Q. Are there any devisaderos further up the creek than those which Mr. Bonillas selected?

A. Yes, sir; there are several of them along the north extremity of the range.

Q. You mean the range south of the Aribac river and along up to this west center monument?

A. Yes, sir.

Q. Is there anything particularly distinguishing about the devisadero Mr. Bonillas has selected different from these other devisaderos on the south boundary more than the others?

A. Nothing, except it is the farthest west, and it is more nearly by itself than any of the others.

Q. It is the most western of the devisaderos?

A. Yes, sir.

Q. But there are devisaderos along the south side of the Aribac river for some distance southeast?

A. Yes, sir.

Q. Is there any mining in that section of country?

A. Yes, sir; mining on the south side of this range of hills.

Q. What as to there being old piles of stones along on this range?

A. There are old piles of stones—landmarks—monuments.

Q. What is the elevation of that pile of stones on the devisadero Mr. Bonillas selected?

A. It is a large pile of loose stones. The entire devisadero
68 is covered with stones; plenty of stones there for any purpose, but the one selected by Mr. Bonillas has been built up.

Q. What as to its appearance in age?

A. It looks to be recent; there is a pole stuck in the monument yet.

Q. Did you take a photograph of that pile of stones?

A. Yes, sir; it is marked number 5. (Marked Defendants' Photographic Exhibit No. 7.)

Q. Who is the man in the photograph?

A. Mr. Leatherwood.

Q. The absent witness in this case?

A. Yes, sir.

Q. Taking this expediente and going on the ground, can you go on the ground and, conforming with the natural objects existing there—any natural objects—can you delineate with any degree of certainty the way in which that grant was surveyed?

A. After going over the ground thoroughly—and the description in the title papers is exceedingly indefinite—after going over the ground and with this description I am prepared to say that I cannot locate that grant absolutely, but approximately I think I can locate what I believe to be the north line and the east line and the west line. I think the east center monument is up the valley—farther up the valley than this spring—and the west center monument, probably, is the same one that Mr. Bonillas took. What is described in the title papers as the point of the water is a movable point. The point where the water stops running is farther up or down the creek, according to the season of the year. The south center monument is somewhere south of the Aribac creek; I do not know where. I think the north boundary line as described runs parallel to the general course of the valley, and the end lines would be perpendicular to that line.

Q. What is the Spanish in the title papers for the south boundary?

A. En una lomita baja.

Q. What does that mean?

A. That means a small, low hillock.

Q. Is Mr. Bonillas' south center monument on a low hillock?

A. It is not; it is on a mesa; on the southern extremity.

69 Back, south of it, there are two high peaks; two of them. This monument is not on a loma or cerro; it is on a mesa.

Q. Generally speaking, what is the character of this valley, starting with the east center monument and going to the west center monument, as identified by Mr. Bonillas, for the purpose of stock-raising?

A. I think it is good for stock, but the western end is not so level as the east. The canyon is below the present town of Aribaca.

Q. How is it as to there being grass on the western end?

A. There is grass on the hills on both sides of the creek.

Q. Suitable for stock?

A. Yes, sir.

Q. What about the east end?

A. There is also grass on the mesa part of the east end. On the south side they go up into the high hills. To the east they run to the Pajarito mountains.

Q. Now, did you make any inquiry as to the old Aribac, the place known as the oldest settlement in that tract?

A. I have. The present village of Aribaca appears to be older than the other—the place marked Old Aribac. At the present Aribaca the ruins are mere mounds of earth, which would indicate greater age.

Q. What as to the suitableness of the valley for settlements in these two places?

A. There are no agricultural lands there except very small quantity at the upper place. At the point where the two valleys come

together there is a much better place for a settlement than the point of the Old Aribaca on this map.

Cross-examination by Mr. FORD:

Q. When were you first out at this place, Mr. Flipper?
A. Last November, 1899.
Q. Ever been there before?
A. I have not; no, sir.
Q. Will you please explain fully what bearing your testimony has as to the effect that there are other piles of stones and other objects than those set out in these title papers?
70 A. My testimony had reference to the monuments described in this title paper. I did not say what bearing the other objects of the country had on the monuments. In this survey they claim to be the monuments described in this document.
Q. Please explain what bearing your testimony has that there are other monuments in other parts of the country as to the monuments set out in this title paper.
A. There are monuments in other parts of the country which have been built up in the last ten or twelve years.
Q. What as to their age and as to what they are? You say these monuments are recent and these trees of slow growth. What degree of accuracy do you want your testimony to be taken?

Objection as to that. That is a matter for the court to determine; that is a question for the court.

Q. What do you mean by recent?
A. Within the last five or six years prior to the time I saw them.
Q. What would indicate that they had been recently built?
A. They are not embedded in the ground, and no moss on the stones also. The stones indicated that they had been taken from the ground.
Q. Did you find any caves or excavations near these monuments?
A. Yes, sir; near each one of these four monuments we found these holes.
Q. Where is this Longoreña mine as compared with the Longoreña mine on this map?
A. About the same place.
Q. Where is the mine that you heard of with reference to the one that is on this map?
A. It is the same mine represented on this map, I think.
Q. There is no question, then, about this mine called the Longoreña mine at or approximately near this place?
A. Yes, sir; it has been so known since 1877 or 1879.
Q. You do not pretend to say that there was not one there before?
A. No, sir; but I could not find any information that there was.
Q. Did you find any person who had been there in 1833?
A. No, sir.
Q. It may be, then, that this was simply taken up in the old name?

71 A. It is quite possible; yes, sir.

Q. And if it is true that this was a mine known in 1833 as the Longoreña mine, then the south center monument would be as described by Mr. Bonillas, or in that vicinity—close in that vicinity—would it not, according to the title paper?

A. It would be somewhere between the Aribac and the Longoreña mine. I am unable to say whether it would be closer to the Aribac or the Longoreña.

Q. I wish you would please turn to the title paper and see what it says about that.

A. "Two sitios of land for breeding cattle, which comprise the ancient and depopulated mining town of Aribac."

Q. And you think it is either at Longoreña or Aribac?

A. One of these two places. As far as I know, it is one of these two places.

Q. Is there, at or near the south center monument as located by Mr. Bonillas, a canyon covered with trees?

A. There is a canyon covered with trees its whole length, and there is a low hill that is next to that canyon. There are low hills the entire length of the canyon, on both sides, but the one on which the monument is placed is a small mesa covered with slaty rock.

Q. Is there at this south center monument or in that immediate vicinity or near to it a mine called the Longoreña mine?

A. There is a mine which at present is called the Longoreña mine, but that Longoreña mine is on the other side of the south center monument.

Q. You do not know where the Punta de Agua is as stated to be in 1833?

A. I do not.

Q. You are not prepared to say that it was not at the point described on this map of Mr. Bonillas?

A. I am not.

Q. In effect you testified that this west center monument answers the call, did you not?

A. I think that monument would answer the call.

Q. You say this description is very indefinite?

A. Yes, sir; it is exceedingly so, compared with descriptions of lands in other titles. There is no survey. He does not give courses or distances.

72 Q. Do you remember making a statement in a report that you got up for Judge Barnes on the Calabasas grant substantially as follows: I am of the opinion that the title is genuine notwithstanding it is obscure and indefinite and defective, and I arrive at this conclusion the more readily because I know that there is about all of the titles issued by the Spanish authorities which I have examined something equally obscure, indefinite, and defective. Do you remember making that statement to Judge Barnes?

A. To the best of my recollection, I made that report.

Q. Do you know Mr. Ignacio Bonillas?

A. I do.

Q. About how long have you known him?

A. I have known him since 1886; possibly since 1885.

Q. What is his profession?

A. He is a civil engineer and surveyor.

Q. What experience, if any, has he had in his profession?

Objection to that, as we have not gone into the competency of Mr. Bonillas except so far as this case.

The COURT: We have in this and other cases passed our judgment as to Mr. Bonillas' qualifications as an engineer.

Question withdrawn.

Q. You spoke of the Tajito mine, did you not?

A. Yes, sir.

Q. I believe you testified that you could not find the mine that was known in 1833 as the Tajito mine, if it was there?

A. No, sir; I could not find any such a mine, and I could not find any one that could find a mine that might fill that description.

Q. You could not say that there were other mines at other place that might fill the same description?

A. I found nothing that would fill that description; there are old mines all through those hills.

Q. Why would not any other mine fill that description?

A. Well, there was there a dump on which were growing some mezquite trees from six to eight inches in diameter, growing
73 up through the dump on the dump, and they must have grown up there since that dump was made.

Q. Do you mean to say that this Tajito mine spoken of in 1833 could not be located any place except at this place which you describe?

A. No, sir. That place I described is on this hill marked U. S. L. No. 5, and Old Aribac is very near that location. Between the mine and these hills there are any number of other mines; so it may be covered up by them, and on the other side of the hill there might be other mines that were covered.

Q. May there not have been other mines there that could have been covered up?

A. It is possible.

Q. Is there not at or near the place described on the map as the north center monument a very prominent hill?

A. There is a high read peak—very high red peak—and on that red peak there is a monument fully as tall as I am, with a pole in it.

Q. Devisadero means a peak, does it not?

A. It means a high, pointed hill.

Q. What sort of a hill is a devisadero?

A. It is a hill, of any configuration whatever, from the summit of which the surrounding country may be seen, or a large circumference of the surrounding country may be seen.

Q. The point on this Bonillas map described as the north center monument—is there a hill from whence a large area of country around may be observed at or near that point?

A. From any point around that north center monument the Aribaca valley——

Q. I did not ask you that. I asked you whether at or near the north center monument there is a prominent hill, from whence a large area of country could be seen—observed.

A. The monument itself is on a large—on a long, large ridge running east and west——

Q. I asked you whether at or near the north center monument there was a prominent hill, from whence a large area of country could be observed.

A. The point on this map marked Red peak is the highest
74 peak in the entire range.

Q. I did not ask you about the highest peak. I asked you whether there was a prominent hill at or near the north center monument, from whence a large area of country could be observed.

A. The highest peak is marked Red peak. This ridge on which this monument stands is not larger than this——

Q. The question can be answered yes or no. The question I asked you is whether at or near the north center monument there is a prominent hill, from whence a large area of country can be observed.

A. I cannot answer that question unless you define what you mean by near. The ridge on which this monument sits runs about three miles east and west, and the ridge must be eight to twelve hundred feet above the valley. It is a big mountain itself. The nearest peak is marked on this map Red peak. That is the nearest one in any direction.

Q. How far is this monument from the Red peak?

A. A mile and a half, about.

Q. Did you find in the valley, east or a little southeast of Aribac, a spring?

A. There is a spring there; yes, sir; in the valley, about three-quarters of a mile from the river.

Q. Is that at or approximately near the point marked on the Bonillas map spring?

A. It is correctly located on this map.

Q. Following that Aribac valley from the spring, what is the topography of the country—any natural features?

A. Going up that east side, there are mesas or hills or lomas. Southeast you go up to the Pajarito mountains.

Q. At about four miles and a half, after going up the valley, is there a small range of mountains running at right angles to the course of the valley?

A. There is.

Q. What is the general formation of that range of mountains?

A. As near as I can recollect it, they are rough, large boulders in them.

75 Q. Gray, rough sandstones?

A. Yes, sir.

Q. Cut up in boulders?

A There are large boulders.

Q. What does calaveras mean?
A. It means skulls.
Q. Do these boulders suggest skulls?
A. No, sir; there is nothing about them to suggest skulls; they are very large—many of them.
Q. About half a mile from the range of mountains did you find a mezquite stump two and a half feet in diameter?
A. No, sir; I did not find any such stump. I never saw a mezquite stump in my life two and a half feet in diameter. It is remarkable if such a stump as that is there. I did see three large mezquite stumps, but not so large as that. There are three there, but considerably smaller than that.
Q. At the place described by Mr. Bonillas as the east center monument did you find there a monument that you testified about?
A. I did; yes, sir.
Q. Did you calcu'ate the area of the Sonoita grant, as shown by the Roskruge survey, and make it out 22,925.87 acres or there-bouts?
A. My recollection is that it was twelve thousand and something.
Q. Did you make a calculation of the area of the Sonoita grant?
A. I did. I made a calculation of the area of the Sonoita grant. I do not recollect the figures, but my recollection is it was twelve thousand and something.
Q. Did you not calculate it to be that area for Mr. Reynolds, which he incorporated in his brief in the Supreme Court?
A. I have no recollection of it.
Q. Do you recollect or not that you calculated it 22,925.87 acres instead of only twelve thousand?
A. I do not; no, sir.
Q. Do you know whether those figures were put in the Government brief?
A. I do not. I did not write that brief.
Q. And you do not know whether this calculation was made?
A. No, sir; I did make a calculation, and I think it was twelve thousand acres and something.

76 Mr. POPE:

Q. Did you find the south center monument of Mr. Bonillas on a loma?
A. I did not; it is on a mesa.

CHARLES BENT, sworn on the part of the Government, testified, upon direct examination by Mr. Pope, as follows:

Q. State your name, residence, and occupation.
A. Charles Bent; residence, Tucson; occupation, miner.
Q. Are you acquainted with the Aribaca grant?
A. I lived out there in 1874—lived out there some fifteen years.
Q. Have you ranch interests there?
A. Yes, sir.
A. At the time you went there in 1874 was any one living there?

A. There was only one person there.

Q. Did you ever hear of what is known as the Aribaca grant?

A. Not until I was there a year or two.

Q. Was there at that time any one living there grazing the grant?

A. Nobody; only this one sheep herder, and he did not claim the grant.

Q. At the time you went there did you learn as to the location of the old Aribac, the original location?

A. We generally called the old Aribac where the present town is now. That was called the old Aribac when I went there.

Q. What as to old ruins there of Aribac?

—. As far as the oldest is concerned, I do not believe there is any difference. There was more adobe houses up at the Aribaca town than there was below. There was only one old house, but I understood at that time that the old Aribac was at the place where the town is now at present.

Q. How many people live there now or were living there in 1892 or 1893?

A. A great many people come in there, off and on, in those mining camps.

Q. How many live there now?

A. Couple of hundred live there at present.

Q. But as to the number that were living there the last time you were living there, about 1891?

77 Objection as immaterial to admit evidence of that character.

Q. Since you have been there has anybody been in occupation of this grant or any part of it, claiming it as a grant?

A. None that I know of, with the exception of Poston, who would drop in there once in a while.

Q. Where does he live now?

A. In Phœnix; old Colonel Poston.

Q. At the time you went there in 1874, were there any former workings of mines in the vicinity of Aribac valley or down on south in that valley?

A. Yes, sir; the country was full of them.

Q. What as to the existence at that time of piles of stones all over the country?

A. The country was full of them, in all directions.

Q. You have been over these hills and mountains and elevations on south of the Aribac valley and all over the country?

A. In every direction.

Q. What as to the existence of piles of stones when you first went there, on these elevations?

A. There were piles of stones there at that time, but I should judge that most of them were put up there as fortifications by men working the mines and placers in that vicinity, and they would pile up big stones to get behind for protection.

Q. Has there been any piles of stones put in there since 1874 up to 1894?

A. Quite a lot of them were put there by miners; some of them were for claims, mining claims, locations.

Q. Are you acquainted with this country going north of the Aribaca river—starting with Telegraph hill and going north and northwest?

A. Telegraph hill has been named since I left there.

Q. Are you acquainted with the section of country going north of the Aribaca river, as indicated on the Bonillas map, and northwest of the Aribaca river?

A. I am acquainted north of the river.

Q. Do you know where Lookout hill or mountain is?

A. Yes, sir; the Mexicans call it Devisadero.

Q. It is a high hill, that can be observed from all directions?

78 A. Well, going north, there are several large hills which they — as lookout hills.

Q. Are you acquainted with any high hill there?

A. Well, from what I understand, I know where it is.

Q. You have ever been up on it?

A. Yes, sir.

Q. When was the first time you were up on top of it?

A. I think I went on top of it in 1875.

Q. Do you know of the existence of a monument there anywhere?

A. On that particular hill, there was a large monument there at that time.

Q. Was that before or after the location of mineral monument number 5 that is there now?

A. I do not know.

Q. All you know is that in 1875 there was a large monument there?

A. Yes, sir.

Q. You do not know whether that monument was a mineral monument?

A. No, sir.

Q. What was the appearance of this pile of stones on top of this devisadero in 1875, as to age? Did it appear to be recently constructed or to be very old?

A. Very old.

Q. Have you ever heard of a mine in that vicinity called the Berito mine while you lived there?

A. No, sir; never have.

Q. Have you heard of one called the Tajito mine?

A. I have.

Q. Did you ever hear of the Longoreña mine?

A. I have.

Q. When did you first hear of that?

A. I think that was in about 1877. I know the parties who located that mine. I believe it was located under the name of Longoreña.

Q. Did it have any name before its location?

A. Not that I know of.

Q. Did you ever know of it to be located prior to the time it was located there then?

A. Yes, sir; I had it located once.

Q. Prior to that time?

A. Yes, sir.

Q. Did you hear it called Longoreña up to the time it was first located?

A. Never, under that name; never.

79 Q. Are you acquainted with this section of country down towards the point marked on this map as the Longoreña mine?

A. Yes, sir; I am.

Q. Any valleys full of trees down in that section?

A. Yes, sir. The Frito cañon has trees and the Yellow Jacket.

Q. What as to high or low hills along these valleys?

A. There are small hills on both sides of the Frito creek, and also towards Aribac, this side of Frito. There are considerable numbers of them.

Q. Describe now these piles of stones that are out in that country now.

A. Well, as to these piles of stones, there were piles of stones there since there were mining camps.

Q. Do the Mexicans ever do any mining without putting up monuments?

A. Never; they always put up monuments.

Q. In these two valleys you refer to?

A. Yes, sir. I found piles of stones in several different places which could be for placers or mining sections.

Q. Are there mines located all over that section of the country south of the river?

A. Yes, sir; mines north and south.

Q. Inside of this grant as surveyed by Mr. Bonillas?

A. Yes, sir. You take it all th-ough, there are mines all through there. There are a great many mines there. I have got mines myself there.

Q. Did you ever hear of the — mountains out there?

A. No, sir. I do not believe I ever did. I never heard of them at all.

Q. Did Colonel Poston, whom you mentioned as having an interest in this grant, ever occupy or live over there?

A. No, sir. He would stay there probably four or five days or two or three days. He would come out there possibly and live at the hotel after 1878 or 1879—after the hotel was built.

Q. Just come over on a visit?

A. Just simply visits; that is all.

Adjourned, 2 p. m.

80 JOHN BOGAN, sworn on the part of the Government, testified, upon direct examination by Mr. Pope, as follows:

Q. State your name, residence, and occupation.

A. John Bogan; Tucson, Arizona; assessor of the county.
Q. Are you acquainted with what is known as the Aribac country?
A. Yes, sir.
Q. And the region taken in by a survey shown you of the private land claim surveyed by Bonillas in March, 1894?
A. Yes, sir.
Q. Did you ever live in the town of Aribaca?
A. Yes, sir.
Q. How long did you live there?
A. I have lived there, off and on, since 1878.
Q. What has been your business?
A. Mining and stock-raising.
Q. In this business have you had occasion to become aquainted with the surrounding country?
A. Yes, sir; I do not suppose there is a hill, cañon, or valley in it that I have not been in.
Q. Do you know where is the old settlement town there—formerly Old Aribac?
A. The town of Aribac was the oldest settlement.
Q. The place marked on this map as Aribaca City?
A. Yes, sir.
Q. There is a settlement further up the river?
A. Yes, sir.
Q. Why have you always regarded it so? Are there more ruins there? How was it generally regarded, as to age, with the other place?
A. I should think it was considered so.
Q. What is the general reputation around there as to its age—has it always been considered the oldest?
A. Ever since I have known it, it was considered that.
Q. The place marked Old Aribac on this map of Mr. Bonillas?
A. Yes, sir.
Q. Do you know or have you ever heard of the Tajito mine?
A. No, sir; I have not.
Q. Do you know mountains, called the Buenavista mountains, north and northwest of there?
A. Yes, sir.
81 Q. Do you know or have you ever heard of a hill or devisadero northwest of this place?
A. Yes, sir; quite a number of them.
Q. Which direction are they from this Aribaca valley?
A. That would be, I should say, a little northwest.
Q. Are there many or few such elevations or devisaderos?
A. Quite a number of them; in fact, the Gijas mountains are all hills or peaks.
Q. How are they, as commanding a view of the Aribac valley, these elevations—these on the front line here?
A. All up and down the river.
Q. This range of hills shown on Mr. Bonillas' map?
A. Yes, sir.
Q. Just to the river and north of the river?

A. Yes, sir.

Q. Do you know a peak among these on which the U. S. mineral monument is situated?

A. Yes, sir; I know two of them.

Q. Do you know the peak on which U. S. location No. 5 is situated?

A. Yes, sir.

Q. How long have you known that hill?

A. I have known it since 1878.

Q. State whether or not that hill commands a view of the valley.

A. It is a quite *a* prominent peak on the front of the range of mountains; it commands a view of the whole valley, up or down; the peak is very commanding, as far as the view up and down the valley is concerned.

Q. Do you remember when U. S. mineral location No. 5 was built?

A. Yes, sir.

Q. When was it built?

A. I would not say positively; I think it was built in 1884.

Q. Do you know its size?

A. It is quite a large monument—say, ten or 12 feet base, and runs up as far as probably 4 feet high.

Q. Were you ever on the top of that hill previous to the erection of this monument?

A. Yes, sir.

Q. Do you know whether, prior to the time that this mineral monument was constructed there, there was any monument there?

A. Yes, sir.

Q. Prior to the location of this mineral monument number 5, was there an old monument there?

A. Yes, sir.

82 Q. I will get you to describe that other monument.

A. This mineral monument was built on top of the other monument. I was with the surveyor. Two mines are tied to that mineral monument. This peak was very prominent. That is why they tied these two mines to this mineral monument. The old monument was already there. That had been there, to my certain knowledge, since 1878.

Q. When you first saw it, in 1878, *was* was its appearance?

A. It was an old monument then.

Q. Now, have you ever been to the other devisaderos, or lookout hills, in this section north of the Aribac river, and indicated by Mr. Bonillas on this map?

A. Yes, sir; every point.

Q. Any old monuments on these lookout hills?

A. Yes, sir.

Q. Just mark these with pencil, please; mark these with letters.

A. (Marked A, B, and C.)

Q. Any monument on that Red hill there?

A. Yes, sir. This mountain is called Red hill.

Q. Do you know where the north monument of this grant, as located by Mr. Bonillas, is?

A. No, sir.

Q. About how far north of the river is this monument located on which you say mineral monument number 5 is situated?

A. I should say that is about three-quarters of a mile; maybe a mile.

Q. Is that called Telegraph hill?

A. Yes, sir.

Q. I believe you said you were acquainted with the country south of the Aribaca river some miles?

A. Yes, sir.

Q. Are you acquainted with what is now called the Longoreña mine?

A. Yes, sir.

Q. When did that first go by that name?

A. That was just before I went to Arizona; somewhere along in 1877—along in January, 1877.

Q. Do you know who located that mine?

A. Ben. Burgin.

Q. The title papers speak of the south boundary being this
83 side of the Longoreña mine, in a small, low hillock near a valley full of trees. Is there only one small, low hillock near a valley full of trees?

A. No, sir; there are many hills, or hillocks, you may call them.

Q. And to what extent is that valley full of trees?

A. It is a small, narrow valley running down on each side of it.

Q. How is that with respect to having trees in it?

A. There are some trees along the general course—cottonwoods.

Q. Is there running water in that valley?

A. Sometimes and sometimes there is none.

Q. What about what is known as Yellow Jacket gulch; are there trees in it also?

A. Yes, sir.

Q. Where does that Yellow Jacket gulch come into the Aribaca valley?

A. It is about, I should say, a mile from Aribac.

Q. In which direction?

A. It is south—a little bit southwest.

Q. Are there hillocks along that valley?

A. Yes, sir; the whole country there is covered with hills. You can find low hills anywhere you want to.

Q. What about piles of stones on these low hillocks on these valleys that you refer to?

A. There are numbers of them.

Q. Well, the description says that there is a pile of stones on a small, low hillock near a valley full of trees. From your knowledge of the country, does that convey to your mind any definite place where such a location can be found?

A. No, sir; it does not.

Q. Are there few or many such small, low hillocks in that vicinity that would answer that description?

A. Many.

Q. What would you say of a description which says, being on a high lookout hill, which is this side of the Tajito mine, and is bounded by the Buenavista mountains—what would you say as to that description? Does that apply to only one place or a number of places within your knowledge?

A. A number of places.

84 Q. A number of points fill that description?

A. Yes, sir.

Q. Did you ever hear of the Calaveras mountains in that country?

A. No, sir.

Q. Are they or are they not well-known mountains?

A. I never heard of them; in fact, there are no such mountains in that country.

Q. Did you know any mezquite trees up the valley at any time in the past?

A. Yes, sir; I know some.

Q. To what extent is the mezquite tree in the valley?

A. There are not a great many; they are at different places, here and there.

Q. Do you know of any mezquite tree with a cross on it?

A. No, sir.

Q. Never have known of that?

A. No, sir.

Q. Do you know where a spring is in the valley?

A. Yes, sir.

Q. From your knowledge of the country, could you take this description and find it up the valley from the spring at a mezquite tree which has a cross and is bounded by the Calaveras mountains; could you locate such a description as that?

A. No, sir.

Q. Would the fact that there was a pile of stones within a hundred yards enable you to make any such location as that?

A. No, sir.

Objection as immaterial. Sustained.

Q. What as to the presence or lack of such piles of stones in this valley above the spring—are there many or few?

A. There is a good many.

Q. When you first went there, in 1878, what as to the presence of piles of stones in those localities?

A. There were many there then.

Q. Going northwest from Aribaca, on the south side of the river, are there any lookout hills?

A. Yes, sir.

Q. I wish you would indicate on this map any lookout hills or devisaderos down there by the letters A.

A. There are many prominent peaks marked A.

Q. Between that and what is marked west center monument what as to there being devisaderos between these two points or look-out hills?

85 A. There are quite a number of prominent peaks. I should say there are at least a dozen.

Q. And in that vicinity what as to the presence of piles of stones on those peaks?

A. There are numbers of them.

Q. Since you have been living on this grant has there been any one in possession of it or any part of it claiming under the grant?

A. No, sir.

Q. Are there any parties holding patents to any portion of this grant under the public land laws?

A. Yes, sir; under the laws of the United States; homesteads.

Q. Will you name such persons as are holding portions of this grant under patents of the United States?

A. Robert Paul, C. W. and George Wright, John Moloney, Dr. Wilbur, his wife, I think; Francisco Maldonado. I cannot think of any others.

Q. Are there miners in there?

A. Yes, sir.

Q. How many?

A. There are quite a number. Most all the valley is full. Up and down the valley are claims. It is claimed from Wilbur's clear up and down.

Q. Any of it fenced?

A. Some, not a great deal.

Q. Any cultivated?

A. As far up as the spring, a great deal of it is farmed. A great deal of it is not fenced, though, above the spring.

Q. Any people making mining locations outside of the grant?

A. Yes, sir; quite a number.

Q. Any patented mines?

A. Yes, sir; several of them.

Q. What are some of them?

A. Fairview, Albert, Mentor, Queen, and the Liberty.

Cross-examination by Mr. FORD:

Q. Did you ever go to this north center monument located by Mr. Bonillas?

A. Never since he has made the survey.

Q. Have you been there?

A. Yes, sir; I have been all over it.

86 Q. Have you been at that point?

A. I should think I have.

Q. From there around northwest you can see to a great extent to the Cerro Colorado mountains?

A. Yes, sir.

Q. Over this tract to the Aribac country?

A. Yes, sir; along the north.

Q. When you go up the valley from the spring you run across a

small range of mountains, do you not, about 4 miles and a half across the valley at right angles?

A. Yes, sir.

Q. These mountains are called the Berito mountains?

A. Yes, sir.

Q. There is no chain of mountains crossing the valley until you come to them?

A. No, sir.

Q. State whether or not close to the valley, on low ground, about half a mile from the range of mountains that you spoke about, there is a large mezquite stump, and on the bank of the valley, about 150 feet from the stump, there is a large monument of loose stones. Do you know whether there is or not?

A. No, sir; I do not know. I never noticed.

Q. Do you know the Longoreña mine?

A. I do not know it. I never heard of it at all.

Mr. POPE:

Q. Looking from Mr. Bonillas' lookout point where you can see just the hills, can you see anything of the Aribaca valley north and south?

A. No, sir.

Mr. FORD:

Q. The title paper does not say that you can?

A. I do not know.

N. W. BERNARD, sworn on the part of the Government, testified, upon direct examination by Mr. Pope, as follows:

Q. State your name, residence, and official position in connection with county.

A. N. W. Bernard; I live in Tucson; I am county supervisor.

Q. Do you know where the place Aribac is?

A. Yes, sir.

Q. Ever live there?

A. Yes, sir; I lived there from 1877 until 1897.

Q. Where is the old settlement of Aribac out there, the one that is called the old settlement, the one that is generally considered the old settlement?

A. The lower one, they call that Old Aribac. There are
87 old ruins up at Aribac, as it now seems to be older than the ones below; there are more excavations or ruins; it is hard to tell. This seemed to be quite a place at one time—quite a lot of houses. There is an old corral there also. At the lower one the settlement is now.

Q. How does that compare with the size of ruins at Aribaca, below?

A. It is larger; evidently been a larger place at one time; the ruins there appear to be older.

Q. How did that compare in 1877, when you went there?

A. The same.

Q. Where is the valley wider?
A. At upper Aribac.
Q. You say you moved there in 1877?
A. The fall of 1877; yes, sir.
Q. What has been your business?
A. Mines and cattle-raising.
Q. Have you had any occasion to become acquainted with the country surrounding Aribac?
A. Yes, sir; I run cattle all over it.
Q. Do you — where is what has been referred to as Telegraph hill?
A. Yes, sir; it is a little mountain lying out nearly north.
Q. How is it with respect to being a point from which the surrounding country can be overlooked; to what extent?
A. You can see it all up and down the Aribaca creek and over to the Cerro Colorado, and mountains 25 miles.
Q. How far is the Cerro Colorado from it?
A. Nine miles.
Q. How, with respect to the Aribac valley?
A. You can see the whole of the Aribac valley from the top of that mountains.
Q. Have you ever been to the top of it?
A. Yes, sir.
Q. Since the U. S. location monument was put there?
A. I have not been to the top since that was put there; there is one up there.
Q. But you were up there before it was put there?
A. Yes, sir.
Q. Was there any monument or pile of scattered stones up there then?
A. I believe there had been a fortification or something of that kind.
Q. What was its appearance as to being recent or otherwise?
A. There was a lot of stones all scattered around, you know; the same as any old monument would be.
88 Q. Were you there when Mr. Bonillas was out there, in 1894?
A. Yes, sir; I was living there at the time. I followed him along to some of the places.
Q. Which ones did you go to with him?
A. From what is described here as Old Aribac—I think he started from there, and the first monument he established was this south center monument, and then from there he established his next one right down on the creek, on the hill, and then from there he established this center monument up by Moloney's ranch—that is up the valley—and then I went with him to this corner monument here; then from there this one here.
Q. The west center, south center, and the east center?
A. Yes, sir.
Q. You did not go with him to the north center?
A. No, sir.

Q. Mr. Leatherwood was there with him?

A. Yes, sir.

Q. Are you acquainted with the north center monument as pointed out to you?

A. I know about where it is; yes, sir.

Q. Have you ever been up there?

A. Never been there since it was put there, but I have been all over that country; I have been to every lookout hill on the north there.

Q. What about this Telegraph hill that you described as being a lookout hill, going north from Aribaca; how does it appear as a lookout hill?

A. I never was on top of this place where this north monument is, but this Telegraph hill you can see from here; it is right in the end of the mountains; you can see it from the valley.

Q. And that Telegraph hill is marked here on this map of Mr. Bonillas' survey, made March, 1894, as U. S. location monument No. 5?

A. Yes, sir.

Q. When you went to this points with Mr. Bonillas that you have described, state whether or not you left them just as you found them.

A. We left the monuments just as we found them—piles of stone. I left them just the way I found them; I did not trouble them at all.

89 Q. Did anybody trouble them after Mr. Bonillas left or while he was there?

A. He put the monuments up himself.

Q. Did you see him put them up?

A. Yes, sir.

Q. Have you ever heard since you have been out there of a mile called the Longoreña mine?

A. Yes, sir.

Q. When did you first hear it called by that name?

A. Since I went out there. I do not know. I could not tell when; perhaps after I had been out there some time.

Q. Do you know who first located it?

A. Ben. Burgin.

Q. Dod you hear of an old mine by the name of Longoreña?

A. No, sir. I do not know whether there was a new one or not. There are a great many more old mines around there, but the one he located he called the Longoreña mine.

Q. This is the same one Ben. Burgin located?

A. Yes, sir. Burgin located it and called it Longoreña mine. The mining records here will disclose that.

Q. Did you find any piles of stones down in that section of the country near the Longoreña mine?

A. Piles of stones; you can find them anywhere you want to.

Q. There is no trouble to point out the boundaries of this tract?

A. No, sir.

Q. Artificial piles of stones that have been carried there by the Indians or miners some time?

A. Yes, sir.

Q. Do you know of any valleys with trees south of the Aribaca river?

A. There are some running up in there where the road runs up. It is called the Oro Blanco or Yellow Jacket road. Several valleys come almost together in this road. After it gets up into the hills there is the Fruitland valley, then a little creek runs into it, and from this creek you go up to another that comes along in here. In here you find old mines, and there is another old mine here, and in this valley here there are trees there—in all, three; then another valley up this way comes in here. It is the same branch of that same valley.

Q. What as to the presence of trees along these various valleys you have described?

A. There are little, low trees along the hills or along the sides of the creeks.

Q. And as to piles of stones along these valleys?

A. As a general thing, you find them on the tops of every little high place—you find stones piled up—and in through here there is any amount of them evidently been piled up by the Indians.

Q. Ever heard of the Calaveras mountains out there?

A. Never heard of them until now—today.

Q. They are not well-known mountains, then?

A. I never heard of them out there at all; never knew there were any such mountains.

Cross-examination by Mr. FORD:

Q. You say this point called Old Aribac is so called today, is it not?

A. Yes, sir; it is called that by most people there.

Q. And these monuments that Mr. Bonillas put up—these were corner monuments, were they not?

A. He claimed them for corner monuments; that is what he claimed.

Q. Describe what monuments you went to.

A. Here; that one; the west center monument, south center monument, and the east center monument.

Q. Did you go to the southeast corner?

A. I went to the southeast corner.

Q. Mr. Bonillas put up a monument there, did he?

A. Yes, sir.

Q. And the southwest corner?

A. No, sir; I did not go *that* that corner; I went to the northwest corner.

Q. Mr. Bonillas put up a monument there?

A. Yes, sir.

Q. Do you know what longoreña means?

A. I have heard it called "long, green."

Q. That is all.

R. N. LEATHERWOOD, sworn on the part of the Government, testified, upon direct examination by Mr. Pope, as follows:

91 Q. State your name, age, and residence.

A. R. N. Leatherwood; I was born in 1844; residence—I am here in summer.

Q. Were you out with Mr. Bonillas on the survey of this Aribaca grant, now on trial, in 1894?

A. Yes, sir.

Q. Were *out* out there with Mr. Henry O. Flipper, on the investigation of this grant, last November?

A. I was.

Q. Did you point out to him the several monuments of Mr. Bonillas' survey?

A. I pointed out to him the south center monument, the west center monument, and north center monument, and the east center monument; these four.

Q. The ones that Mr. Bonillas selected as his monuments on his survey?

A. Yes, sir.

Q. Do you remember showing Mr. Bernard the north center monument of this grant?

A. I showed it to him from the valley—that is, I showed him the top that it stood on.

Q. The one that you showed him was the one that Mr. Bonillas selected on this survey?

A. Yes, sir.

No cross-examination.

Mr. POPE: That is the Government's case.

GEORGE J. ROSKRUGE, sworn on the part of the plaintiff, testified, upon direct examination by Mr. Ford, as follows:

Q. You are a surveyor, are you not?

A. Yes, sir.

Q. Been a surveyor for a great many years?

A. Yes, sir.

Q. How long have you lived in Pima county, Arizona?

A. Ever since 1874.

Q. What official positions have you held?

A. County surveyor, U. S. deputy mineral surveyor, and land surveyor for the U. S. Government, and chief clerk and draughtsman for the surveyor general, and surveyor general for Arizona.

Q. Did you ever go out to what is called the Aribac grant?

A. Yes, sir.

Q. When did you first go there?

92 A. I think in 1877 I passed through there, and then I went back probably two or three years afterwards; I have been there several times, at the place called Old Aribac.

Q. Where is that town with reference to the present town of Aribaca?

A. Probably about a mile or a mile and a half beyond the creek, on the right-hand side.

Q. Did you ever make, on behalf of the Government, a preliminary survey of the Aribac land grant?

A. Yes, sir.

Q. About when was that?

A. I think it was in 1881.

Q. Did your preliminary survey include the Old Aribac?

A. Yes, sir.

Q. And the present town of Aribaca?

A. Yes, sir.

Q. How many leagues or acres did it contain?

A. Two leagues.

Q. Did that include the running water on the grant?

A. Yes, sir.

Q. It took in all the valley?

A. Yes, sir.

Q. Have you the field-notes or plat of the survey with you?

A. No, sir; the field-notes are in the surveyor general's office, on file; the plat of the grant was made by the draughtsmen in the surveyor general's office, from my notes.

Q. Do you know whether that is correct or not?

A. I believe it is.

Q. State how many acres the grant contains.

A. 8,680.52.

Q. Can you furnish the data by which that grant can be identified on the ground?

A. Yes, sir.

Q. Please do so.

A. The public surveys have been enclosed on this grant since it was surveyed by me in three or four different places; there — enough monuments on this grant to identify it on the ground. The initial monument of the preliminary survey is north 38 degrees 15 minutes east, between sections 3 and 34 and townships 21 and 22 N., range 10 east, in Arizona; that initial monument connects with the public surveys.

Q. From that initial monument, giving the courses and distances here on this preliminary survey, you can reproduce this survey, could you?

A. Yes, sir.

Cross-examination by Mr. POPE:

93 Q. What corner section of the public survey did you say your preliminary survey tied to?

A. The closing corner is between sections 3 and 34, townships 21 and 22 north, range 10 east.

Q. Have you ever seen the map made by Mr. Bonillas in evidence in this case, made about March, 1894?

A. No, sir; I never did.

Q. You never examined it?

A. No, sir.

Q. How far south of the present town of Aribac does your preliminary survey run?

A. About two miles.

Q. And how far is it from the present town of Aribac, on your map, to your west boundary?

A. About three miles; a little over three miles.

Q. What month and year did you survey that?

A. In February, 1881.

Q. And you run then to the end of the water, you said?

A. I commenced about a mile above the spring, east of the spring.

Q. And how far is the end of the water up the stream?

A. I took in all the water on the grant; I went a mile above the spring, beyond where the river sank.

Q. And how far beyond that?

A. Probably a mile.

Q. Do you know which boundary *us* further west, the one you place there or the one Mr. Bonillas has placed?

A. I do not know anything about Mr. Bonillas' survey.

Q. Is your plat to which you have referred correct in all respects?

A. I believe it to be; yes, sir.

Q. You found the places and monuments where you put them, did you?

A. Yes, sir.

Q. They are all correctly represented on your plat?

A. Yes, sir.

Q. At the present town of Aribaca, did you find any ruins?

A. I do not know of any ruins right at it; I remember there was one old house, the house Mr. Bernard afterwards lived in.

Q. When were you first there?

A. Probably in 1877 or 1878. Three or four gentlemen
94 who went there in 1877 stated that there were very old ruins there at that time, but I cannot testify to that fact; I think that they are right, but I may be mistaken. I asked Mr. —— where the Old Aribac was, and he took me down to the same place.

Q. What is the distance between Old Aribac as you established it and the present town of Aribaca?

A. It must be about a mile and a quarter or a mile and a half.

Mr. FORD:

Q. Your preliminary survey did not pretend to conform to the natural objects called for, did it?

A. No, sir.

Q. It was simply a survey to the extent of quantity, was it not?

A. I surveyed the two leagues of land. It was left a good deal to me. They wanted it for cattle-raising in that valley. I used my own judgment as to where to locate it.

Mr. POPE:

Q. Did you have the title papers with you on your preliminary survey?

A. Yes, sir; and the instructions from the surveyor general. I had a copy of what he had; it is in his report on that grant.
Q. You did not have a copy of the grant or a translation?
A. I had his instructions, and I filed the instructions with the surveyor general.
Q. You were not a cattleman, were you?
A. No, sir; never have been; no, sir.
Q. Just a surveyor?
A. Yes, sir.

I hereby certify that the above and foregoing is a full, true, and correct transcript of all the testimony taken down by me in shorthand on the trial of the above-entitled case in open court.

W. J. McPHERSON,
Official Stenographer.

[Endorsed:] Arivaca L. & Cattle Co. *vs* U. S. Testimony. Filed in the office of the clerk, court of private land claims, Mar. 30, 1900. Jas. H. Reeder, clerk, by —— ——, deputy.

95 DEFENDANTS' EXHIBIT 1.

Extract from "Official Report on the Condition of the Archives or Records of the Titles to Land Grants in Arizona, and Similar Grants in Mexico, by Special Agents Will M. Tipton and Henry O. Flipper."

Page 100.

"162. ARIBAC (Arizona)."

There is absolutely nothing in the archives concerning this grant except the entry in the book of Toma de Razon under the year 1833, on page 1 of leaf 13, as follows:

"On the 12th of July there was delivered to Captain Don Ignacio Elias Gonzalez the grant title, issued on the 2nd of July of the current year, for two sitios of land for raising cattle and horses, which is comprised in the place called Aribac, situate in the jurisdiction of the Upper Pima country, in favor of citizens Tomas and Ignacio Ortiz, residents of the presidio of Tubac.

MILLA."

Filed in the office of the clerk, court of private land claims, Feb. 9, 1900.

JAS. H. REEDER, *Clerk.*

96 DEFENDANTS' EXHIBITS.

No. 2. Photo.
" 3. "
" 4. "
" 5. "
" 6. "
" 7. "

97 And afterwards, to wit, on the following day, being the 10th day of February, A. D. 1900, the court gave its decision as follows:

THE ARIVACA LAND & CATTLE CO.
vs.
UNITED STATES ET AL. } No. 7. Aribac Grant.

This cause having come on to be heard at the present term, and having been submitted upon full legal proof and hearing, and the court, upon consideration and examination of said cause, being sufficiently advised in the premises, doth find that said petition for the confirmation of the private land claim known as and called the Aribac grant, alleged to be situate in the county of Pima, Territory of Arizona, and more particularly described in plaintiff's petition on file in this cause, has not been sustained by satisfactory proof, and that the title so asserted to that tract of land, title to which is alleged to have been issued to Tomas Ortiz and Ignacio Ortiz by Jose Maria Mendoza, treasurer general of the State of Sonora, on July 2, 1833, is of no validity, and that the grant or concession so claimed is not such an one as the United States are bound to recognize and confirm by virtue of the treaties of cession by Mexico to the United States, by the laws of nations, or by the laws and ordinances of Spain and Mexico. It is therefore ordered, adjudged, and decreed that the said claim to the said tract of land be, and the same is hereby, rejected and said petition dismissed.

This February 10, 1900.

(Signed) JOSEPH R. REED,
Chief Justice.

98 *Opinion of the Court.*

THE ARIVACA LAND AND CATTLE CO.
vs.
THE UNITED STATES.

In this case a majority of the court are of the opinion that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it. The claim is therefore rejected on that ground.

While I agree to that view of the case, I am also of the opinion that the claim should be rejected on the further ground that the grant does not appear to have been recorded within the meaning of the treaty of 1853. It is true that an entry with reference to the grant appears in the Toma de Razon, but we held in the Cameron case that the expediente of the proceedings under which the sale and grant were made constituted the record contemplated by the treaty. In this case the "titulo" held by claimants shows that a proceeding was had in 1833 for the revalidation of a title issued in 1812, but the proper Mexican archives, viz., those at Hermosillo, Sonora, do not now contain the expediente of the proceedings, either

of 1812 or 1833, nor does it appear that either was ever in the archives.

Mr. Justice Fuller concurs in this view.

JOSEPH R. REED,
Chief Justice.

Murray, J., concurs in result, but not in views holding as to record. Sluss and Stone, JJ., dissent.

Filed in the office of the clerk, court of private land claims, Feb. 10, 1900.

JAS. H. REEDER, *Clerk*,
By —— ——, *Deputy.*

99 *Opinion of Judge Murray.*

In the U. S. Court of Private Land Claims, Tucson, Arizona, February Term, 1900.

THE ARIBACA LAND AND CATTLE COMPANY
versus
UNITED STATES. } No. 7.

I concur in the conclusion reached by the court in this cause; but, in my opinion, the grant is duly recorded in the archives of Mexico. The Toma de Razon is the proper book in which grants of land are to be recorded. The expediente or titulo which contain the various steps leading up to the issuance of the grant are never recorded. The law requires only a record of the grant to be made in the Toma de Razon. The grant is not copied in full, as is the practice in the United States, but a short entry is made showing the date of the grant, to whom granted, the number of sitios contained in the grant, the country or jurisdiction in which the land is located. There being a Toma de Razon of the grant in this cause, as required by the laws, usages, and customs of Mexico, it is duly recorded in the archives of Mexico.

(Signed) WILLIAM W. MURRAY,
Associate Justice.

Filed in the office of the clerk, court of private land claims, Feb. 10, 1900.

JAS. H. REEDER, *Clerk*,
By R. L. LONG, *Deputy.*

100 In the Court of Private Land Claims.

THE ARIVACA LAND & CATTLE CO.
vs.
THE UNITED STATES ET AL.

Dissenting Opinion.

The grant document introduced to sustain the claim in this case is a titulo or grant title, issued by Jesus Maria Mendoza, as treasurer general of Sonora, July 2d, 1833, to Tomas and Ignacio Ortiz. The power of the State of Sonora to dispose of the public lands within its limits at the time of the issuance of this titulo has been upheld by the Supreme Court in the case of Camou *vs.* The United States, 171 U. S., 277.

By law No. 30 of May 20, 1825 (see Reynolds' Compilation, 129), the State of Sonora made provision for the disposal of the public lands within its limits.

Sec. 19 provides: "The treasurer as the immediate chief of all the revenues shall make the sales and give the titles."

The titulo or grant title issued by the treasurer general was the final act of the government in the matter of the conveyance of the land, and operated as a conveyance of the title to the same effect as a patent does under the system of disposing of the public lands in the United States.

In Minter *vs.* Cremmelin, 18 Howard, 87, it was decided that "where a patent has been issued by the officer having authority to issue it, the presumption is that it is valid and passed the legal title; furthermore, it is *prima facie* evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent."

In other words, the recitals of fact, upon which the authority to issue the document is based, are to be taken as true.

By sections 27, 28, and 31 of the law of Sonora above referred to it was provided:

"27. Those who possess sitios and who, although they have them registered and surveyed, have not obtained the title, shall present themselves to the treasurer general and shall state in writing the cause of that failure, the deputy or judge who made the survey for them and the payments they made.

101 "28. The treasurer shall fix for this purpose the time that seems to him proper and, as soon as he gets all the information together, shall render a report to the government, which shall order the proper steps to be taken with regard to the rights of the parties in interest and those of the treasury."

"31. Those who have an order for the registry of sitios under the former practice are guaranteed by this law."

The "government" referred to in section 28 was the chief executive of the State.

It clearly appears from these provisions that where a party claimed a tract of land by purchase under proceedings under the ordinance

of the intendants, not having received his final title, he could lay his case before the chief executive of the State, who had authority to investigate and determine the validity and extent of the claim, and if found to be valid, to order the proper steps to be taken to perfect the title.

The titulo introduced in evidence therefore proves that the grantees, Tomas and Ignacio Ortiz, presented their claim before the governor of Sonora and offered evidence in support of it; that the evidence produced showed that in the year 1812 Augustine Ortiz, a citizen of the presidio of Tucson, purchased at public sale two sitios of land for $747.00 and 3 reales, which he had paid into the treasury, together with all the costs and taxes and per cent. required by law.

That the land was situated at and comprised the old and dilapidated settlement of Aribac, in the jurisdiction of Pimera Alta, and that the landmarks of the boundaries of the tract were: On the north, on the high pointed hill or lookout hill, rising on the south of the Tagito mine and bordering on the Buenavista mountains; on the south, a low hill next to a cañon covered with trees and north of the Longorena mine; on the east, a mesquite tree with a cross on it, standing up the valley and to the east of the spring and at the border of the Calaberas mountain; on the west, a pointed hill at the Punta de Agua, opposite the Babuquivari mountain.

Upon the documentary and oral evidence submitted to him the governor made the following finding and order:

102 "Whereas, the possessory right of the citizens Tomas and Ignacio Ortiz has been legally proved, and the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Arabac still exist and have been recognized, and the principal value of the land has been paid to the public treasury, as is shown by the documents exhibited by their attorney; the treasury shall therefore order the grant to be issued to the interested parties who demand it, in accordance with the law."

It would seem to be a reasonable construction of the proceeding to say that it amounted to an adjudication by the officer authorized to make it; that the two sitios had been legally sold to Augustin Ortiz; that the purchase-money and all costs, taxes, etc., had been paid; that Tomas and Ignacio Ortiz had succeeded to the title of Augustin Ortiz, and were entitled to a grant title of the land, and that the boundaries were those above described. On that adjudication the title was issued.

The titulo, then, is of itself sufficient to prove the making of the grant, and this conclusion is not questioned in the case. The majority of the court, however, are of the opinion that the claim cannot be confirmed, on the ground that, in their opinion, the case does not satisfy the requirements of that provision of the treaty known as the Gadsden purchase, which is that no grants of land will "be respected or be considered as obligatory, which have not been located, and duly recorded in the archives of Mexico."

It is claimed that at the time — the making the treaty this grant had not been located and had not been duly recorded.

First. As to the question of location.

I take it that a grant has been located within the meaning of the provision of the treaty in question when it affects to convey a particular tract of land capable of identification to a reasonable certainty.

Now, giving this titulo the most narrow construction possible, it plainly purports to convey a tract of two sitios to a certain place, with a recital that the tract so conveyed is identified by boundaries which are evidenced by certain specified objects. By any fair construction, it purports on its face to convey the whole of the tract within these boundaries.

103 It does not say that it was the conveyance of a right to select two sitios thereafter to be identified and located within the prescribed outboundaries. It purports to be the final act of the government—the investiture of a complete title to a specified tract, with no future act to be performed.

The contention, however, is that inasmuch as the grant purports to be of only two sitios and the original sale, having been made in 1812, must have been a sale of a limited quantity, and the outboundaries mentioned in the grant containing in fact an area in excess of two sitios, it must be construed as a sale of a certain limited quantity to be thereafter selected within a larger tract and was necessarily in the nature of a float, and not "located," within the meaning of the treaty.

This contention demands consideration.

The grant recites that the original sale was made in 1812; therefore it must have been made under section 81 of the ordinance of the intendants as modified by the royal order of February 14, 1805 (Reynolds, 68). This order required, and it was the practice, that no more than four sitios could be sold to one person of wealth and no more than two to a poor person; that the lands should be surveyed and appraised and not be sold for less than the appraisement, and that the appraisement should not be less than certain fixed sums, regulated according to the character of the land.

Having in view these provisions and the recitals in the grant document, it is a necessary inference that the original sale was for a certain quantity of land, at the place specified, which had been surveyed by officers duly authorized to make the survey and appraised in pursuance of the royal order.

The question is therefore presented squarely, Do not the proceedings of the survey, appraisement, sale, and conveyance operate as a location of the tract sold within the meaning of the treaty?

In my judgment, the proceedings do have that effect.

The essential feature or object of the proceeding was the 104 protection of the revenue to ensure a fair value for the lands sold. To secure this end was the object of the appraisement. This was practically the only protection there was. The law fixed a minimum limit.

Now, what is an appraisement except an appraisement of a certain thing? How can a man appraise two sitios of land unless he knows what two sitios? How could the appraisers know what two

sitios they were to appraise? Why, this was the very object of the survey, to mark out on the ground the tract to be appraised and sold.

To survey a tract of land means to mark it on the ground, not in the air nor on paper. The surveyor was an officer of the government delegated to mark on the ground the tract sought to be purchased. When the survey was completed appraisers were summoned and sworn to appraise the tract of land surveyed. They were not authorized to determine whether the survey was correct or not, or whether it contained a greater area than the quantity sought to be purchased. In fact, they were not supposed to know what area was contained within the boundaries, nor what quantity was petitioned for. The surveyor was authorized to fix the boundaries and determine the quantity of land within these boundaries. The appraisers could not "go behind the return" of the surveyor as to the area of the tract surveyed. That was their guide, and they appraised that tract identified by the boundaries adopted by the surveyor as to the two sitios of land, which was the quantity determined by the surveyor to be contained within the boundaries.

By that survey and that appraisement the land was offered for sale at public auction at the capitol of the district, many miles from the land, and all the world was invited to come and buy; so I may say that the only fair construction of the transaction is that by the intent of the parties the outboundaries established by the surveyor were the boundaries of the two sitios appraised and sold, and evidenced the location of the tract sold.

Presumptively the survey was correctly made. The presumption of law is that an officer does his duty. Wherever the deter-
105 mination of any matter is committed to a public officer, the determination so made is binding until set aside in a proper proceeding. An error in the determination cannot be shown in a collateral way.

No survey is ever perfectly accurate. Never were two surveys made precisely alike. They are pre-eminently matters about which different men reach different conclusions. If the survey were in fact erroneous, covering an excess of land over the quantity directed to be surveyed, such error would not render the survey or subsequent proceedings based thereon void as to such excess, but rendered it voidable only as to such excess.

The error or mistake in the survey did not appear upon the face of the proceeding.

Now, it is a principle universally recognized that an official proceeding which is not void upon its face, but voidable only by reason of some mistake or error in the course of the proceeding, is valid and binding until set aside or annulled in a direct proceeding for that purpose.

The Supreme Court, in Graham *vs.* U. S., 4 Wall., 259, and U. S. *vs.* Pico, 5 Wall., 536, has clearly indicated that the proceedings of these officers in surveying and establishing the boundaries of tracts of land for purposes of segregation from the public domain are in

the nature of a judicial proceeding and have all the force and effect of judicial determinations binding upon the former government.

By this it is not meant that they are *res judicata*, finally and conclusively binding. A mistake is always open to correction, but can only be corrected in a proper proceeding.

The idea I seek to emphasize is well expressed in Smelting Company *vs.* Kemp, 104 U. S., on page 640.

"The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of the title the law has made numerous provisions designating the persons who may acquire it and the terms of acquisition. That the provisions may be properly carried out a Land Department, as part of the administration and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their
106 close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment."

The views thus expressed are equally applicable to the proceedings of Spanish and Mexican officials in the disposition of the public domain. They are not merely an exposition of a peculiar rule of American law, but the expression of hard, common, human sense applicable to the world round.

My conclusion, therefore, is that the proceedings of the survey operate as a determination that the boundaries of the two sitios are the landmarks specified in the report of the survey, and that this determination remains true and binding until set aside in a proceeding for that purpose.

Such, it seems to me, was the view of the matter taken by both Spain and Mexico, as shown by the practice of those governments. By a proceeding of denouncement and composition, lands within these surveyed outboundaries could be surveyed, and if an excess were found it could be appraised and sold; but I think I can safely say that there was no other way in which the excess could be reached until denouncement was made and a determination was had of the question of an excess—that is to say, until the original survey was directly proceeded against and determined to be erroneous, the purchaser under the original proceeding held the possession and dominion of the entire tract, by its surveyed outboundaries, against all the world. By the original proceeding the entire tract was segregated from the public domain, and remained segregated until—a proceeding, under a denouncement for that purpose, the excess, or "de-

masias," was established or adjudged to exist and as such subject to sale. Until that occurred, there was no excess, of demasias.

On these views I base my conclusion that at the time of the
107 treaty the grant had been located within the meaning of the provision in question. Evidence has been introduced tending to confuse the question as — which of several are the true landmarks, especially on the north and south sides; but landmarks of the kind described in the survey are there. The only confusion is that more than one object is found answering the description. Of these it is our province and duty to determine, to the best of our judgment, which is the proper one.

Old Aribac is there; Aribac creek is there; the spring up the valley to the east is there; the Punta de Agua (meaning the point where the creek in ordinary stages sinks in the sand) is there; the cañon covered with trees, on the south, is there, and the range of mountains, on the north is there, and there is the tract, beyond the possibility of a doubt.

Second. As to the question of the record.

The only record at this time found in the archives of Mexico concerning this grant is an entry in the Toma de Razon for the year 1833, as follows:

"On the 12th day of July there was delivered to Captain Don Ignacio Elias Gonzales the grant title, issued on the 2nd day of July of the current year, for two sitios of land for raising cattle and horses, which *is* comprised in the place called Aribac, situate in the jurisdiction of the Upper Pima country, in favor of citizens Tomas and Ignacio Ortiz, residents of the presidio of Tubac; Milla."

The contention is that this is not a sufficient record of the grant within the meaning of that provision of the treaty, "nor will any grants of land be respected or be considered obligatory which have not been located and duly recorded in the archives of Mexico."

There is no question but that the Toma de Razon is a public record, and that it was the duty of the officer issuing the grant title or "titulo" to make an entry in that book of the fact, just as was done in this case.

The entry proves the issue of the title, and when the title itself is found, confessedly genuine and conforming exactly to the title in the Toma de Razon, the proof is convincing beyond reasonable
108 doubt that that title was legally issued, and that it is the act, and all its recitals are the declarations, of the government.

The titulo in this case, therefore, supported as it is by the record, is proof of the truth of the facts recited in it.

This titulo sets out what is purported to be a copy of the proceedings had in the case, the expediente, in other words, followed by a granting clause, as was the almost universal practice in such cases. The original proceedings so copied are a part of the archives of the government, and must necessarily exist in order to authorize the officer to issue the title, so that a recital in the titulo of the existence of the original proceedings, or expediente, is a proper recital and is to be taken as true.

The recital of the copy of the expediente in this titulo shows that the expediente itself contained at its conclusion this declaration:

"In these terms this expediente was completed with all the requisites and formalities established by law, and it remains in the archives of this office as a perpetual record."

Is there anything in evidence to create in the mind a reasonable doubt of the truth of that statement? The existence of the titulo itself and of the record in the Toma de Razon are sufficient to convince the ordinary mind, reasoning from a knowledge of the requirements of the law and the uniform practice in such cases and the presumption which attends the performance of official acts, that at the time of the issue of the titulo the grant was duly recorded in the archives of Mexico.

And in this connection I wish to emphasize the point that it is simply a question of fact, to be proven like any other fact, as to whether the grant had been recorded.

The treaty does not stipulate for a grant which now is on record, but for a grant which has been recorded. It did not stipulate that, even though a grant had been duly recorded, yet if that record had been lost or destroyed the grant was forfeited. The object of the stipulation was that the United States should have fair and substantial protection against fraudulent and floating grants. It was not intended to be used as a club to defeat honestly acquired titles.

109 The record stipulated for was the system of records as maintained in Mexico, not for the recording acts of any of our States.

The evidence brings this grant strictly within the letter of the treaty. The record was made full and complete. The fact that the expediente is not now in the archives only shows that the document has been lost; it does not show that it never existed there, nor does it show that the document was not there at the time of the treaty.

The entry in the Toma de Razon is a record of the fact of the making of the grant and of the issue of the title. It is true that it did not contain a precise delineation of the outer boundaries, but it fulfilled the spirit of the requirement of the treaty. It showed that the two sitios comprising Ald Arabac had been granted; it put the United States on inquiry, and pointed out the leading-strings of the whole facts, and that is all that is required of a record.

I think the treaty was fulfilled, both in letter and in spirit, and the claim should be confirmed for two sitios, and that the preliminary survey made by the surveyor general of Arizona should be adopted as a fair delineation of the boundaries.

(S'g'd) HENRY C. SLUSS,
Associate Justice.

I fully concur in the foregoing opinion of Mr. Justice Sluss, both in his conclusions and the soundness of his reasoning, since, upon the undisputed facts in evidence, I can conceive no other rational

and just conclusion than the one so clearly deduced by my associate, Justice Sluss.

(S'g'd) WILBUR F. STONE,
Associate Justice Court P. L. C.

Filed in the office of the clerk, court of private land claims, Feb. 10, 1900.

JAS. H. REEDER, *Clerk*,
By —— ——, *Deputy.*

110 And be it further remembered that afterward, to wit, on the 7th day of April, A. D. 1900, the following affidavit and motion *was* filed in the office of the clerk, at Santa Fé, N. M.:

In the United States Court of Private Land Claims.

ARIVACA LAND AND CATTLE COMPANY, Plaintiff, *vs.* THE UNITED STATES ET AL., Defendants.	Affidavit and Motion for Rehearing.

Comes now Arivaca Land and Cattle Company, by Rochester Ford, its attorney, and moves the court to vacate and set aside its judgment and decree herein and grant a rehearing and new trial of this cause for the following reasons:

I.

That the said judgment and decree are contrary to the evidence, in holding that the grant herein was not sufficiently located.

II.

That since the decree was rendered in this case new and material evidence has been discovered of the location of one of the landmarks defining the grant, to wit, the Longorena mine; that heretofore, to wit, on March 27, 1900, Col. C. D. Posten informed affiant that the mine designated as the Longorena mine on the map herein by Ygnacio Bonillas was known to the said Posten by that name as early as the year 1856, and that it was generally known by that name by the Mexicans residing at and near Arizaca at that time.

III.

That this knowledge on the part of Col. C. D. Posten was not known to counsel before the said 27th day of March, 1900.

Counsel further represents that if he is permitted to introduce additional evidence in this case he can, as he is informed and believes, satisfactorily identify the location of the said tract of land.

Counsel further represents to the court that two of the members of the court were of the opinion that the grant was satisfactorily identified, and that, as above stated, additional evidence, which will

be put in if this motion is granted, will remove any doubt as
111 to the location of the said grant; and counsel further represents that this application is not made for delay, but counsel believes that justice will be subserved if further evidence is introduced.

ROCHESTER FORD.

Subscribed and sworn to before me this 5th day of April, 1900.

[Seal of Wiley E. Tussing, Notary Public, Pima Co., A. T.]

WILEY E. TUSSING,
Notary Public, Pima County, Arizona.

My commission expires April 29, 1901.

Filed in the office of the clerk, court of private land claims, April 7, 1900.

JAS. H. REEDER, *Clerk*,
By —— ——, *Deputy.*

112 And be it further remembered that afterward, to wit, on the 25th day of April, A. D. 1900, before the court, sitting at Santa Fé, N. M., the following order was made, to wit:

THE ARIVACA LAND AND CATTLE COMPANY
vs.
UNITED STATES ET AL. } No. 7.

Now, on this 25th day of April, A. D. 1900, this cause came on for hearing before the court in regular session at Santa Fé, N. M., on plaintiff's motion to vacate and set aside the judgment and decree in this cause heretofore entered, and the court, having heard and considered the evidence offered in support of said motion and the arguments of counsel and being advised in the premises, it is ordered that said motion be overruled.

(Signed) JOSEPH R. REED,
Chief Justice.

And be it further remembered that thereafter there was filed in the office of the clerk an appeal and allowance and a citation; which appeal and allowance and citation are in the words and figures following, to wit:

113 In the United States Court of Private Land Claims.

THE ARIVACA LAND AND CATTLE COMPANY
vs.
THE UNITED STATES OF AMERICA, N. W. BERNARD, J. W. HOGAN, Salvador Piguitori, Ignatio Ortiz, Antonio Aguirre, Antonio Cora, Indalcio Aguirre, Pedro Meranda, Jesus Silvas, Francisco Tapio, Charles Weatherington, W. S. McKnight, John Kelner, Ramon Zepado, Pedro Zepado, Patsey Powers, Miguel Moreno, Refil S. de Wilbur, J. B. Conti, H. Menager, H. N. Laboree, A. Hemme, —— Suarez, Richard Roe, John Doe, and Anselmo Anselmus.

Case Number 7.
Arivaca Grant.

The above-named plaintiff, conceiving itself aggrieved by the order and judgment entered on February 10, 1900, in the above-entitled cause, prays that it be allowed an appeal herein, returnable sixty days from the date thereof, and does hereby appeal from said order and judgment to the Supreme Court of the United States, and further prays that a transcript of the record and proceedings and papers upon which said order and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States.

ROCHESTER FORD,
Attorney for Arivaca Land & Cattle Co.

Tucson, Arizona Territory, June 13, 1900.

And now, to wit, on June 18, 1900, it is ordered that the appeal be allowed as prayed for.

JOSEPH R. REED,
Chief Justice, Court of Private Land Claims.

Due and legal service of copy of the foregoing application for an appeal and allowance thereof is hereby acknowledged this — day of June, 1900.

MATT. G. REYNOLDS,
U. S. Attorney, Court of Private Land Claims.
WM. H. BARNES,
BARNES & MARTIN,
Attorneys for Other Defendants.

114 In the United States Court of Private Land Claims.

THE ARIVACA LAND & CATTLE COMPANY
vs.
THE UNITED STATES OF AMERICA, N. W. Bernard, J. W. Hogan, Salvador Piguitori, Ignatio Ortiz, Antonio Aguirre, Antonio Cora, Indalcio Aguirre, Pedro Meranda, Jesus Silvas, Francisco Tapio, Charles Weatherington, W. S. McKnight, John Kelner, Ramon Zepado, Pedro Zepado, Patsey Powers, Miguel Moreno, Refil S. de Wilbur, J. B. Conti, H. Menager, H. N. Laboree, A. Hemme, —— Suarez, Richard Roe, John Doe, and Anselmo Anselmus.

Case Number 7, Arivaca Grant.

UNITED STATES OF AMERICA, *ss:*

To The United States of America, N. W. Bernard, J. W. Hogan, Salvador Piguitori, Ignatio Ortiz, Antonio Aguirre, Antonio Cora, Indalcio Aguirre, Pedro Meranda, Jesus Silvas, Francisco Tapio, Charles Weatherington, W. S. McKnight, John Kelner, Ramon Zepado, Pedro Zepado, Patsey Powers, Miguel Moreno, Refil S. de Wilbur, J. B. Conti, H. Menager, H. N. Laboree, A. Hemme, —— Suarez, Richard Roe, John Doe, and Anselmo Anselmus:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, sixty days from and after the date of this citation, pursuant to an appeal filed in the office of the clerk of the court of private land claims, district of Arizona, wherein The Arivaca Land and Cattle Company —and The United States of America, N. W. Bernard, J. W. Hogan, Salvador Piguitori, Ignatio Ortiz, Antonio Aguirre, Antonio Cora, Indalcio Aguirre, Pedro Meranda, Jesus Silvas, Francisco Tapio, Charles Weatherington, W. S. McKnight, John Kelner, Ramon Zepado, Pedro Zepado, Patsey Powers, Miguel Moreno, Refil S. de Wilbur, J. B. Conti, H. Menager, H. N. Laboree, A. Hemme, —— Suarez, Richard Roe, John Doe, and Anselmo Anselmus are respondents, to show cause, if any there be, why the judgment rendered against the said appellant in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

115 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18 day of June, 1900.

JOSEPH R. REED,
Chief Justice, Court of Private Land Claims.

Due and legal service of the foregoing citation is hereby acknowledged this 18 day of June, 1900.

MATT. G. REYNOLDS,
U. S. Attorney, Court of Private Land Claims.
WM. H. BARNES,
BARNES & MARTIN,
Attorney- for Other Defendants.

116 *Certificate of the Clerk.*

UNITED STATES OF AMERICA, }
Territory of Arizona. }

I, James H. Reeder, clerk of the court of private land claims, do hereby certify that the foregoing is a full, true, and correct transcript of the pleadings, testimony, proceedings, judgment, opinions, and order allowing appeal, and citation in the case entitled The Arivaca Land and Cattle Company, plaintiff, against The United States *et al.*, No. 7, Aribac grant, as the same appears from the records of my office.

Given under my hand and the seal of said court this 13th day of August, A. D. 1900.

[Seal Court of Private Land Claims, Tucson, Arizona.]

JAMES H. REEDER, *Clerk*,
By R. L. LONG, *Deputy Clerk*.

117 In the Supreme Court of the United States.

ARIVACA LAND AND CATTLE COMPANY }
vs. } No. 414.
THE UNITED STATES. }

It is stipulated herein that defendants' photographic exhibits, numbers 2 to 7, inclusive, which accompanied the transcript from the court of private land claims, may be omitted from the printed record in this cause, and the clerk of the Supreme Court of the United States is hereby requested to omit the said exhibits.

ROCHESTER FORD,
Attorney for Arivaca Land and Cattle Co.
MATT. G. REYNOLDS,
Attorney for the United States.

Approved:
J. K. RICHARDS,
Solicitor General, for the United States.

[Endorsed:] In the Supreme Court of the United States. No. 414. Arivaca Land and Cattle Co. *vs.* The United States. Stipulation.

118 [Endorsed:] File No., 17,899. Supreme Court U. S., October term, 1900. Term No., 414. The Arivaca Land and Cattle Co., app't, *vs.* The United States *et al.* Stipulation to omit certain parts of record in printing. Filed May 28, 1901.

Endorsed on cover: File No., 17,899. Court of private land claims. Term No., 153. The Arivaca Land and Cattle Company, appellant, *vs.* The United States *et al.* Filed September 5th, 1900.

No. 153.

Brf. of Ford for Appt.

Filed Dec. 13, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 153.

THE ARIVACA LAND AND CATTLE COMPANY,
APPELLANTS,

vs.

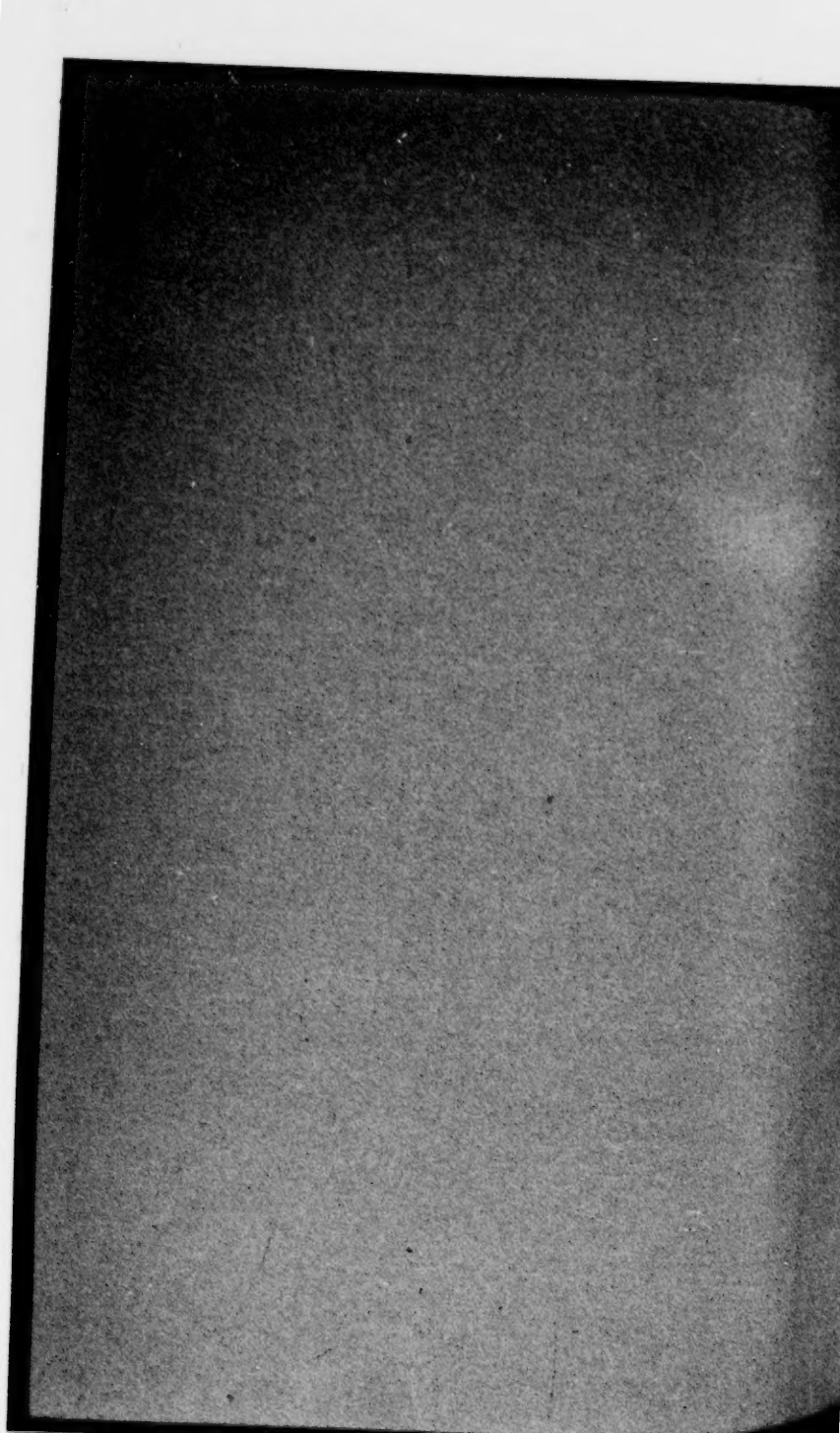
THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF OF THE ARGUMENT, AND ARGUMENT.

ROCHESTER FORD,
Attorney for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1467



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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 153.

THE ARIVACA LAND AND CATTLE COMPANY,
APPELLANTS,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement of the Case, Specification of Errors, Brief of the Argument, and Argument.

I.

STATEMENT OF THE CASE.

This case was instituted by the filing by the Arivaca Land and Cattle Company of its petition (rec., pp. 1–5), in which it alleged that it was the owner in fee of the Arivac or Arivaca land grant, in Pima county, Arizona, and prayed for a confirmation thereof. The petition set out the facts that said grant was instituted in 1812, and on October 10, 1812,

was sold at auction by the proper officers of the Spanish government to Don Augustin Ortiz; that the land was fully paid for at the time of sale, but that final title was not then issued; that the land was occupied by the purchaser, and after his death by his sons, Tomas and Ygnacio Ortiz, continuously up to 1833, when the sons filed a petition with the Treasurer General of the State of Sonora, stating that the land had been sold, paid for, and occupied, as above set out, and praying that proof might be taken as to these facts, and that a title be issued; and the petition further represented that all this was done, and that on July 3, 1833, a grant in fee was issued to said Tomas and Ygnacio Ortiz.

The proceedings before the Treasurer General of Sonora show (rec., pp. 20–22) that testimony of three witnesses was taken as to the landmarks and boundaries of the grant. The statement as to the first witness is as follows (p. 20):

"And having been asked to state whether said Aribac ranch had been settled and occupied by the deceased Don Augustin Ortiz and heirs since the year 1812 up to the present time, and whether the landmarks that designate its boundaries are the same that have existed and do exist today in the four cardinal points, said that from said year 1812 up to his death Don Augustin Ortiz kept said Aribac ranch settled and occupied, and that his sons Don Tomas and Don Ygnacio Ortiz had kept it in the same condition since their father's death up to date; and that concerning the landmarks that designate the four cardinal points, those that I have seen in the examination of the land are the same that have existed upon it without any variation, the one towards the north on the high-pointed hill (devisadero) that rises on this side of the Tajito mine, and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut on it and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra del Baboquivari."

The second witness testified that (p. 21):

"The ranch called Aribac has been settled and occupied from the year 1812 up to the present time by the deceased, Don Augustin Ortiz, and his successors, Don Tomas and Don Ygnacio Ortiz; and that the landmarks that designate the boundaries that have just been mentioned on the four cardinal points are the same and without any variation which since that time have designated the limits of their measurement."

The testimony of the third witness was the same.

The Treasurer General thereupon forwarded to the governor of the State of Sonora his report (p. 23) stating that by the proper documents:

"The interested parties show that in the year 1812 two sitios of land for raising cattle were surveyed and sold at auction to their deceased father, Don Augustin Ortiz; that since that time the land has been occupied without any interruption; that there exist today the landmarks placed at that time, and that all dues are paid to the public treasury."

The treasurer further stated that the parties had complied with article 27 of Law No. 30 of May 20, 1825 (Reynolds, p. 131), and recommended that the grant be issued. An order was made reciting that "whereas, the possessory right of the citizens Tomas and Ygnacio Ortiz has been legally proved, and the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized," and a formal title was issued so that the grantees might "freely cede and alienate said land as they may please and determine as absolute owners and proprietors thereof in fee," and this grant was "duly recorded in the proper book." It further appeared (rec., pp. 25, 26) from the books of record of the State of Sonora for the year 1833 that Tomas and Ygnacio Ortiz had paid the charges due on the issuance of the formal

title, and that the same had been recorded in the Book of Toma de Razon under the proper date.

At the trial the petitioners produced as a witness one Ygnacio Bonillas, a Spanish gentleman thoroughly educated and skilled as an engineer and surveyor, having been educated at the Boston (Massachusetts) University of Technology, and having practised his profession as a surveyor since 1883. He testified that he had made a great many surveys, both in Sonora and Arizona, of land claimed under grants from the Mexican government, and he gave in detail (rec., pp. 12–18) the particulars of his survey of this Arivaca grant. He first located the place called "Old Aribac," and also located the north center monument, which is designated as being on the top of a "devisadero" or "lookout" hill or monument. The south center monument is established on a low hill on this side (or north) of the Longorena mine. The witness testified that he "found such a hill as was described. The Longorena mine is a mine that is well known even to the present time; it is located on the trail that goes from this part of the country to Sonora, and it is well known, and it is so known to the present time; so I went to that mine and then from there I looked towards the north, and the description further says that this hill where the monument is is situated near a gulch where there is a rough growth of timber. There is only one gulch—the Marguita gulch. I looked for this monument on both sides or banks of this gulch, and I found a very large old monument on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill 'devisadero.' They are nearly in line"

The witness testified also as to the location of the monument towards the east, and as to the monument called for on the west he stated as follows (rec., p. 14):

"The title says the monument is established upon a lookout hill at the Punta de Agua. I went to the west, to the water or creek that runs there, and at the proper place I

found the monument. It is there—a very old one. It is on a very high hill, at the Punta del Agua, and all those points are known by those same names today. It is undoubtedly the west center monument. I found the pointed hill or devisadero. The title says that this monument is on this hillock fronting the Sierra Babuquivari, and if you stand at the old ruins and look at the west center monument you will see that it is towards the Babuquivari mountains. The mountains form the background."

The case was argued and submitted and taken under advisement by the court and held under advisement for almost five years, when the order of submission was set aside and further evidence introduced by the United States and also by plaintiff (rec., pp. 39–69). The testimony of the government witness H. O. Flipper was aimed at showing that the grant could not be exactly or precisely located on the ground.

Three of the judges of the lower court were of the opinion (p. 70) that "there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it," and the grant was rejected on that ground, and two of the justices thought the grant had not been recorded. Mr. Justice Sluss delivered the dissenting opinion, in which he fully discussed the law and the facts, and was of opinion that the grant should be confirmed, and Mr. Justice Stone concurred in this view.

Petitioner was allowed an appeal and duly prosecuted same to this court.

SPECIFICATION OF ERROR.

The court erred in rejecting the grant, because the record shows that every requirement of law was complied with to constitute a complete and perfect title in fee, and the evidence shows that the grant can be located on the ground.

POINTS AND AUTHORITIES.

I.

The issuance of title by the State of Sonora was in compliance with section 28 of the Law of May 20, 1825.

Reynolds, pp. 129–131.

II.

The affirmative evidence and the weight of the evidence shows that this grant can be accurately located.

Testimony of Bonillas, rec., pp. 10–18.

Testimony of Flipper, rec., p. 48.

Testimony of Roskruge, rec., p. 66.

Opinion of Judge Sluss, rec., p. 77.

III.

In this case there are no measurements, and the ordinary rule that statements of quantity yield to natural objects should apply.

U. S. *vs.* Hancock, 133 U. S., 193, 196.

IV.

The entry in the Book of Toma de Razon is a recording of the grant such as complies with the provisions of the treaty.

U. S. *vs.* Osio, 23 How., 273–279.

The grant itself states that it was to be "recorded in the proper book," which was done (pp. 25, 26), and at the foot of the grant is the statement: "This title is recorded on page 15 of the proper book which exists in this Treasury General."

This also is sufficient proof of its record.

Applegate *vs.* Lexington and Carter County Mining Co., 117 U. S., 255–262.

Stebbins *vs.* Duncan, 108 U. S., 32–50.

ARGUMENT.

I.

This title was issued in strict compliance with the statutory law (Reynolds, pp. 129–131). Mr. Justice Sluss in his opinion quotes the provisions of the law under which this grant is issued, and his discussion is so full that nothing need be attempted to be added. The various provisions are set out in Reynolds, pages 129–131. On page 32 of the record herein is given a list of some of the similar grants which were instituted prior to the independence of Mexico and were confirmed and final title issued thereon by the authorities of the State of Sonora. The issuance of a formal paper title for land which had been sold and paid for is an act of natural justice, and was expressly recognized by statutory provision of Sonora, and this was done in very many cases.

II AND III.

The majority opinion herein states merely that the three judges rendering it "are of the opinion that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it. The claim is therefore rejected on that ground."

It will be noted that in this very brief dismissal of the case there is nothing to show what land the majority of the court thought was intended to be granted, and no discussion of the evidence by which it was attempted to identify the land. Some of the monuments are conceded by all the witnesses to be correct, and it would seem that an investigation of the evidence would disclose that the weight of the evidence, if not the undisputed evidence, shows that the grant can be located.

The dissenting opinion is very much fuller and carefully goes into every point in the case, and as to this opinion Associate Justice Sonte says:

"I fully concur in the foregoing opinion of Mr. Justice Sluss, both in his conclusions and the soundness of his reasoning, since, upon the undisputed facts in evidence, I can conceive no other rational and just conclusion."

What are the "undisputed facts?" When this case was tried in 1895, the government did not attempt to call in question the correctness of the survey of Ygnacio Bonillas. His testimony was not challenged in any respect, nor was any witness examined on the part of the government. Almost five years later the submission was set aside, and Mr. Henry O. Flipper, "special agent for the Department of Justice, assigned for duty to the office of the U. S. attorney for the Court of Private Land Claims," contradicts Mr. Bonillas in some respects. This Mr. Flipper testified (rec., p. 50) that he had made a report on the Calabasas grant in Arizona substantially as follows:

"I am of the opinion that the title is genuine, notwithstanding it is obscure and indefinite and defective, and I arrive at this conclusion the more readily because I know that there is about all of the titles issued by the Spanish authorities which I have examined something equally obscure, indefinite and defective."

In all the controverted cases which have come before this court Mr. Flipper has been unable to identify the calls of the grants. What was plain to all the other witnesses and to this court he could not see. In the case of Ely's Adm'r *vs.* U. S., 171 U. S., 220, this witness swore that, in his opinion, the country did not conform to the expediente at all and that the central point of the grant could not be identified, but this court said that it judged from the testimony that it was possible to locate the central point.

The testimony of this witness ought not to have the weight

of that of Mr. Bonillas, a wholly disinterested person, competent and experienced in the highest degree.

However, after all the criticisms that Mr. Flipper could make as to the survey of this grant, he testified (rec., p. 48):

"A. After going over the ground thoroughly,—and the description in the title papers is exceedingly indefinite—after going over the ground and with this description I am prepared to say that I cannot locate that grant absolutely, but approximately I think I can locate what I believe to be the north line and the east line and the west line. I think the east center monument is up the valley—farther up the valley than this spring—and the west center monument, probably, is the same one that Mr. Bonillas took. What is described in the title papers as the point of the water is a movable point. The point where the water stops running is farther up or down the creek, according to the season of the year. The south center monument is somewhere south of the Aribac creek; I do not know where. I think the north boundary line as described runs parallel to the general course of the valley, and the end lines will be perpendicular to that line."

Mr. Flipper testified (p. 49) that he was first out at this place in last November (1899), and had never been there before.

Disregarding any other testimony, it is submitted that even by this unfriendly witness the grant can be perfectly well identified. The central point, according to Mr. Flipper, is the place called Arivaca. The west center monument taken by Mr. Bonillas answers the calls of the grant. The east center monument is up the valley. The title paper says that it was on a tree that borders on the Sierra de las Calaberas, and the unquestioned testimony is that going up the valley beyond the spring for a distance of about four miles and a half "there is a small range of mountains running at right angles to the course of the valley" (see testimony of Bonillas, p. 13; of Flipper, p. 52, eleventh line from bottom), and "that there is no chain of mountains

crossing the valley till you come to them" (testimony of Bogan, p. 62, sixth line from top). The east center monument borders, as above stated, on this small range of mountains, which have been conclusively identified, and the point taken by Mr. Bonillas is within half a mile of those mountains (rec., p. 13). This gives the center, the west center, and the east center monuments. The north line, according to Mr. Flipper, can be located by him as running over the top of the "devisadero," on which is the monument known as U. S. L. monument No. 5. This north boundary line, according to this witness, runs parallel to the general course of the valley, and the end lines would be perpendicular to that line. This gives the center, the north line, and the east and west lines, and if there were no evidence as to the location of the south center monument it could easily be located, because, according to Mr. Flipper (rec., p. 50, eighth line from top), "it would be somewhere between the Aribac and the Longoreña mine." If its exact location is not conceded, it should be taken on the line between the Longoreña mine and Arivaca, as far to the south of Arivaca as the north center monument is to the north of that place. A line through this south center monument parallel to the north line would complete the four sides of the grant.

It thus appears that under the evidence given by the witnesses for the government this grant can be located. We submit that under the weight of the evidence the south center monument should be taken at the place where Mr. Bonillas testified it is. This south monument is described as "standing on this side (north of the Longoreña mine) on a low hill next to a cañon covered with trees." The testimony of Bonillas accurately locates this monument in strict conformity with the calls of the title papers (rec., p. 13). Mr. Flipper endeavors to contradict Mr. Bonillas, but does not, in fact, cast any real doubt over the evidence. It is conceded that at the place taken by Mr.

Bonillas as the Longorena mine there is a mine now known by that name (rec., p. 49, 14th line from bottom). Mr. Flipper testifies that he did not find any person who had been there in 1883, and that "it is quite possible that this mine was simply taken up in the old name" (p. 49). This mine is south of Arivaca, thus answering the call of the expediente. Mr. Bonillas testified that "the Longorena mine is a mine that is well known, even to the present time. It is located on the trail that goes from this part of the country to Sonora" (p. 13). The title papers state that at the time they were issued there was a mine called the Longorena, which, according to the description, must necessarily have been very near to the mine now called by that name, and that the present Longorena mine is the same one as the ancient one by that name seems clear to a reasonable intent, if not absolutely certain. Mr. Flipper further testified (p. 50) that at or near the south center monument, as located by Mr. Bonillas, "there is a cañon covered with trees its whole length, and there is a low hill that is next to that cañon." This absolutely conforms to the call of the expediente, and would seem to remove any honest doubt as to the location of this south center monument. The map of Bonillas, facing page 30 of the record, shows the Longorena mine, the Fraquita wash or cañon (printed as "Marquita" on p. 13 of the record) running northwest to the Arivaca creek, and the south center monument next to this cañon, which is covered with trees its whole length. The only difference of opinion is as to the description of the immediate point where this south monument is placed. Mr. Bonillas testified that it is "on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill devisadero." Mr. Flipper testifies that this monument is "on a small mesa covered with slaty rock." As the mine has been identified and the cañon covered with trees and the low hill next to the cañon, it is submitted that it is wholly imma-

terial whether Mr. Flipper describes a particular point as a low hillock or a small mesa. Taking the testimony as a whole, the only reasonable conclusion seems to be that Mr. Bonillas found and correctly located the south center monument.

As is said in the dissenting opinion (p. 77):

"Old Aribac is there; Aribac creek is there; the spring up the valley to the east is there; the Punta de Agua (meaning the point where the creek in ordinary stages sinks in the sand) is there; the cañon covered with trees on the south is there, and the range of mountains on the north is there, and there is the tract beyond the possibility of a doubt."

The majority opinion enters into no consideration of the evidence and gives no reason for the conclusion "that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it." Three of the judges without an examination of the evidence thought it "impossible" to identify the land, but the other two, on examination of the evidence, say that the tract is there "beyond the possibility of a doubt," and we think it is entirely safe to urge that the dissenting opinion herein is the one which has some reasons for the conclusions arrived at.

As was said by this court in U. S. *vs.* Sutherland, 19 How., 363, 364, referring to surveys or descriptions of Mexican grants:

"Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a deseño or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills and mountain ranges. The distances between the mountains were often estimated at *about* so many leagues, and fractions of this unit little regarded. To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear rather as vague and uncertain boundary lines. But where lands had no value, and the unit of measurement was a league, such monuments were considered to

be sufficiently certain. * * * The United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government, and this court have no discretion to enlarge or curtail such grants to suit our sense of property or defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected."

The further question remains to be considered, Was the whole or only part of this tract granted, and if part, what part? The learned opinion of Justice Sluss (p. 74) goes into this question fully, and, again to quote the language of his associate, it would seem that one "can conceive no other rational and just conclusion than the one so clearly deduced by him." Justice Sluss says:

"Now, giving this titulo the most narrow construction possible, it plainly purports to convey a tract of two sitios at a certain place with the recital that the tract so conveyed is identified by boundaries which are evidenced by certain specified objects. By any fair construction it purports on its face to convey the whole of the tract within these boundaries. It does not say that it was the conveyance of a right to select two sitios thereafter to be identified, and located within the prescribed boundaries. It purports to be the final act of the government—the investiture of a complete title to a specified tract, with no future act to be performed."

The learned justice shows that the grant could not be one in the nature of a float, and continues as follows:

"The question is therefore presented squarely, Do not the proceedings of the survey, appraisement, sale and conveyance operate as a location of the tract sold within the meaning of the treaty?

"In my judgment the proceedings do have that effect."

After showing that the very object of the survey was to mark on the ground the tract of land to be sold, and that

the appraisement was of the tract of land surveyed, the learned justice adds:

"So I may say that the only fair construction of the transaction is that by the intent of the parties the outboundaries established by the surveyor were the boundaries of the two sitios appraised and sold, and evidenced the location of the tract sold.

"My conclusion, therefore, is that the proceedings of the survey operate as a determination that the boundaries of the two sitios are the landmarks specified in the report of the survey, and that this determination remains true and binding until set aside in a proceeding for that purpose."

The confirmation or grant in 1833 was evidently of the tract of land according to the specified boundaries thereof. The language of the title paper seems to admit of no other construction. The witnesses testified that these boundaries were the limits of the measurements of the purchaser in 1812, and that "there exist today the landmarks placed at that time (1812)," and that since 1812 "the land has been occupied without any interruption," and the decree (rec., p. 23) recites that "the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Arivac still exist and have been recognized."

All this refers to the whole of the tract, because there is absolutely no suggestion that the right to select part out of the tract was what was granted. If the parties were not entitled to the whole of the tract it is impossible to believe that their rights would not have been adjusted when they made application for title in 1833. If they were entitled to only part of the tract there was no better time than in 1833 to identify once for all what they owned, and if the Mexican government intended to reserve any part of the tract then was the time to declare so.

We think the language of this court in U. S. *vs.* Hancock, 133 U. S., 193, 196, fully applies to the present state of facts:

"It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, 'a little more or less,' which amount was very much less than that included within the boundaries."

There seems to be nothing in the language of the petition of the heirs of Ortiz or in the grant or any of the proceedings leading up to the delivery of the final title to show that any one had any idea or conception that the grantees were not to have all the land within the boundaries of the tract identified by the witnesses in 1833.

Justice Sluss points out in the present case what is true of all the grants in the territory acquired under the Gadsden purchase that they are, in the very nature of the case, not "floats," but are sales of tracts of land previously identified by a survey. To attempt to liken these grants to the floating grants made under a wholly different system in California is to attempt a manifest impossibility. The grants by quantity, or floating grants of California, were not surveyed at the time. "The right to so much land to be afterwards laid off by official authority in the territory described passed (in California) from the government to the grantee by the execution of the instrument granting it" (Fremont *vs.* U. S., 17 How., 542, 558). Grants of quantity, or floats, "usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession is limited to the specific quantity mentioned, and that the magistrate of the vicinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation."

When, in California, the quantity which passed under the grants was surveyed by the officers of the government and segregated from the public domain by the boundaries estab-

lished and the grantee put in possession, "what was previously a grant of quantity became a grant of a specific tract," and the establishment of this tract was in the nature of a judicial proceeding and had all the force and effect of a judicial determination binding upon the former government.

Graham *vs.* U. S., 4 Wall., 259.
U. S. *vs.* Pico, 5 Wall., 536.

The difference between the California and Sonora grants is that this judicial determination of the specific tract which was made after the grants in California was, in the Sonora grants, made before the sale. The proceedings of survey, measurement, appraisement, etc., in Sonora were similar to the establishment of the boundaries by the officers in California. In each case the effect was that of a judicial identification of the tract which became private property.

It will thus be seen that the Sonora grants were executed contracts of sale of the whole of a tract of land the boundaries of which had previously been established by the proper officers of the Mexican government and the value of such tract fixed by the appraisement, so that the sale was "the investiture of a complete title to a specified tract, with no future act to be performed."

This has always been common knowledge in the profession. Mr. Spaulding, in his work on public lands, has as section 511 the following:

"In the treaty of Guadalupe Hidalgo; in the Gadsden treaty; grants in Arizona and New Mexico. 2. Grants (so called) where the land, after certain preliminary proceedings, was put up at auction and sold to the highest bidder. In other words, they are executed contracts of purchase, instead of grants."

These Arizona grants have been before the Court of Private Land Claims for many years. The judges of that court have had extended opportunities for their consideration,

and the conclusions which Mr. Justice Sluss arrived at are certainly entitled to great weight. His reasoning seems conclusive in support of his view that by the survey and appraisement and sale the purchaser acquired title to and dominion over the entire tract by its boundaries against all the world.

In addition to the foregoing testimony, the witness George J. Roskruge, formerly United States Surveyor General for Arizona, and a most competent and experienced surveyor, testified that in 1881, under instructions from the Surveyor General, he had executed a preliminary survey of the Arivaca grant to the extent of two leagues, or 8,680.52 acres This survey takes in the town of Arivaca and Old Arivaca, and includes all the water on the grant.

In Ely's Adm'r *vs.* U. S., 171 U. S., 220, 241, referring to these surveys and the question of excess, this court said:

"If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity, by its commissioner or master, to determine exactly what was intended to pass under the grant."

But in the present case there are no measurements and no reason for restricting the area of the grant. The order under which the grant was issued recited, as heretofore quoted, that "the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized." This is an unqualified statement that the boundaries of the two sitios were the ones testified to, and the case is therefore the ordinary one where there is a difference between the estimated contents and the actual area, and the familiar rule applies that natural objects control statements

of quantity. This rule is as applicable to Mexican grants as to conveyances under the common law, and U. S. *vs.* Hancock, *supra*, is one of the many instances of the application of the rule. Where a tract is conveyed by well-defined natural objects, the evident intention being to convey the whole of such tract, it is believed that no case can be found holding that the statement of quantity controls the natural objects.

IV.

Two of the judges expressed the opinion that this grant "does not appear to have been recorded within the meaning of the treaty of 1853." That view is based on the fact that although there is a proper entry at the proper time in the Book of Toma de Razon, and although the testimonio, or original patent, which was offered in evidence and is conceded to be genuine, bears at its end the endorsement that "this title is recorded on page 15 of the proper book which exists in this Treasury General," still, because the expediente or matrix is not now to be found, there is no record.

Such view is opposed to the holdings of this court and to the practice as followed in Sonora, as shown by the many records which have been before the lower court and this court on appeal. The established and universally followed custom was that an expediente was made, containing a full record of all proceedings up to the payment of the money. There was then issued the titulo or testimonio, which contained the contents of the expediente, sometimes in a complete form, but oftener condensed in part, and contained also the "*pro tanto*," or granting, clause. Note of this title was then made in a book called the Toma de Razon, and at the bottom of the titulo was appended an endorsement that "this title is recorded on page — of the proper book." The expediente was retained in the archives, but the testimonio or titulo was delivered to the grantee as his muniment of

title, just as a United States patent is issued after the land laws of the United States have been complied with.

The treaty speaks of grants which have been "duly recorded." This means, of course, recorded according to the laws and customs of Mexico. The testimonio in the present case, as in every other, provides that the "title shall be delivered after being duly recorded in the proper book," and also recites that "this title is recorded in the proper book." It is evident, therefore, that "duly recorded" means "recorded in the proper book," which was done in this case, as is shown by the copy of the entry from the Book of Toma de Razon (rec., p. 26). This entry appears in the book of record at the proper date, and is shown in connection with the one immediately preceding and following it, so that it is impossible to claim that it was in any respect irregular. The grant was recorded in strictest compliance with the law, and the fact that the expediente has been lost or mislaid is immaterial. Considering the various revolutions in Mexico, and the way in which the archives were moved from place to place, the standing wonder is that the records have been preserved in as good condition as they now are.

The practice of recording land titles in Sonora is similar to the one which prevailed in California, regarding which this court said, in U. S. *vs.* Osio, *supra*:

"Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled according to the practice in the department of California, when a short entry was made in a book kept for that purpose specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument to the effect that such an entry had been made," etc.

As heretofore stated, there is a certificate at the bottom of this grant to the effect that such an entry had been made,

and on turning to the book of records the entry is found in its proper place, as called for.

Justice Sluss in his dissenting opinion fully discusses this question of record, and Justice Murray in his separate dissenting opinion also shows that the grant was duly recorded, and counsel feels that it would be useless to try to add anything further on this question.

We think that this grant should be confirmed for the whole of the tract as shown by the monuments and boundaries.

Respectfully submitted.

ROCHESTER FORD,
Attorney for Appellants.

PETITION FOR REHEARING

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE ARIVACA LAND AND CATTLE COMPANY, Appellant, vs. THE UNITED STATES et al., Appellees.	No. 153. Appeal from the Court of Private Land Claims.

(March 24, 1902.)

Mr. Chief Justice Fuller delivered the opinion of the Court.

PETITION FOR REHEARING.

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant in the above entitled cause, the Arivaca Land and Cattle Company (a corporation), respectfully applies for a rehearing of the same upon the following grounds:

The Court erred in affirming the decree of the trial Court, and in thus holding that this grant is void for the following reasons, to-wit:

First.

THE ORIGINAL SPANISH VERSION OF THE GADSDEN TREATY, WHICH WAS RETAINED IN THE POSSESSION OF THE MEXICAN GOVERNMENT, DOES NOT CONTAIN ANY REQUIREMENT OR CONDITION TO THE EFFECT THAT A GRANT MUST BE "LOCATED" IN ORDER TO BE RESPECTED OR CONSIDERED AS OBLIGATORY.

The question was orally argued before this Court in the case of *Faxon* vs. *United States*, reported in 171 U. S. p. 244, and likewise in the brief which was filed therein by Francis J. Heney, Esq., on the part of the appellant. The question, however, has never been expressly decided by this Court prior to the decision in the case at bar, although it must be conceded that the case of *Ely's Administrators* vs. *United States*, 171 U. S. 220, leans that way in its reasoning.

The law on this subject is so clear, however, and the fact that the Spanish version of the treaty does not contain the word "located" is so free from doubt, that we are irresistibly led to the conclusion that this Court overlooked that fact in writing its opinion in the Ely case and likewise in this case.

Shortly after the publication of the decision of this Court in the Ainsa case, counsel for certain grant claimants sought the opinion upon the questions involved, of eminent authority upon Mexican law, and we herewith present the essential part of the joint opinion of Hon. Y. Sepulveda, Secretary of Legation at Mexico, and of Hon. Luis Mendez, President of the Mexican Academy of Legislation and Jurisprudence, upon this particular question.

To them belongs the credit of calling attention first to a patent and most important contradiction which exists between English and Spanish copies of the treaty mentioned, in a particular which, under rules of construction of similar treaties, will do away with the element of "location", so held in the Ainsa case as a necessary requisite to confirmation of these grants.

Both the English and Spanish copies of this treaty are originals. Messrs. Sepulveda and Mendez, among other things, say:

" U. S. Statutes at Large, Vol. 10, p. 1031. The con-
" tradiction or mistranslation occurs in article VI,
" of the treaty: *Id.*, p. 1035, as follows:

FROM THE ENGLISH:

Or will any grants made previously be respected or be considered as obligatory which have not been *located* and duly recorded in the archives of Mexico.

FROM THE SPANISH:

Ni tampoco se respectáran, ni considerarán como obligatorias ningunas concesiones hechas con anterioridad que no hayan sido *inscritas* y debidamente registradas en los archivos de Mexico.

" It is apparent that the word 'located' should have " been omitted from the English copy, and the word " 'inscribed' used instead.

" *Dominguez Diccionario Nacional*, inscrito, ta. " part. pas. irr. de Inscribir.

" On the other hand, if the English word 'located' " expressed the intention of the contracting parties, the " corresponding word in the Spanish version would " have been 'colocado'.

" *Dominguez Diccionario Nacional*, 'colocado', da. " part. pas. de colocar o colocarse.

" *Spanish and English Dictionry*, Velazquez, 'to lo- " cate', p. 314; 'colocar', p. 162.

" The word INSCRITAS, in the Spanish text of the treaty, from INSCRIBIR, signifies, speaking of titles by grant, to enter them in writing in some register or book of registers, and, in the legal Mexican expression, the words, REGISTRO E INSCRIPCION, REGISTRADO, é INSCRITO, are used indifferently one for the other, to signify the same idea, that is TO MAKE a note or make a compendium in a book called 'Register Book, Record Book' (Libro de Registro ó de Inscripciones) of the contents of a document. Hence these expressions we find used indistinctly in the Mexican Civil Code; for instance, in Title XXIII. of the Book III. of the Civil Code, which treats of the Public Register, or Books of Record, where note is to be taken of certain titles or documents mainly relating to real estate, we read: Art. 3188. 'The ' REGISTRY (record) shall be made in the office ' where the property mentioned is, according to its ' situation.' Art. 3189. 'If the property should ' be situated in different districts, the registry shall

'be made in all of them.' Art. 3190. 'Ninguna 'inscripción puede hacerse si no consta que el que 'la pretende es actualmente dueño de los bienes, 'tiene derecho para exigir el REGISTRO ó pro-'ceda con podor legal del propietario (No INS-'CRIPTION shall be made if it does not 'appear that the one desiring it to be 'made is the present owner of the property, having 'a right to demand its REGISTRY, or acts with a 'legal power of the owner). Art. 3191. 'Solo 'pueden INSCRIBIRSE los títulos que constan de 'escrituras públicas, y las sentencias y providencias 'judiciales certificadas legalmente.' (There can only be INSCRIBED the titles that appear in public writings and the judicial sentences and orders legally certified.) Art. 3219. 'LAS INSCRIPCIONES 'no se extinguen en cuanto á tercero sino por su 'cancelacion, ó por el REGISTRO de la transmision 'del domino ó derecho real INSCRITO á otra per-'sona' (The inscriptions are not extinguished with regard to third persons, unless they be canceled, or by the registry of the transfer of ownership or right of realty INSCRIBED to another person). Examples might be multiplied to show that in the language of the Mexican laws now as before, and at all times, the INSCRIPTION of a grant or title to land, as well as that of any other instruments or documents, is nothing more than taking note of it or having it entered in a public REGISTER or Record."

Second.

THE SPANISH VERSION OF THE GADSDEN TREATY MUST CONTROL IN CONSTRUING THIS GRANT, BECAUSE

(*a.*) *This identical point was decided in the case of*

U. S. versus Arredondo, 6 Peters 740, where this Court said:

> "The King of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted, and the thing reserved and excepted in and by the grant. The Spanish version was in his words, and expressed his intention, and, though the American version showed the intention of this Government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted and what reserved; the rules of law are too clear to be mistaken and too imperative to be disregarded by this Court. We must be governed by the clearly expressed and manifest *intention of the grantor, and not the grantee*, in private a fortiori, in public grants."

This has become a rule of property which ought not to be disturbed or changed except for very momentous reasons.

(b) *The best writers on International Law declare that when a treaty is made in two languages, and one expresses a different idea from the other, that text ought to be taken as the original in which the treaty was negotiated, and the other as an authentic translation; and the original text should prevail and the translation ought to be corrected.*

See *Annotations on Marten's Compendium of Derecho de Gentes*, Book VI, p. 179, by Penheyro-Ferreira.

This view of the question is in conformity with the principles governing contracts between individuals.

The presumption is that a contract was entered into in the language of the country where it was made, and especially is this so when the subject matter is an instrument which in most countries, Mexico among them, can only be executed in the official language which is the national language. The treaty of 1853 was negotiated in Mexico and presumably it was negotiated in Spanish, and presumably the text in that language served for its discussion.

(c.) *So far as the rights of individuals are concerned, in construing statutes, treaties, contracts, and written instruments generally, the courts adopt a liberal construction, and if the statute or treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal as respects such rights, the latter is to be preferred.*

1 Kent Com., 174;
Sharkes vs. *Dupont*, 3 Pet. 242;
Hauenstein vs. *Lynham*, 100 U. S. 483;
The Amiable Isabella, 6 Wheat. 1;
U. S. vs. *Perchman*, 7 Pet. 832;
North German Lloyd S. S. Co. vs. *Hadden*, 43 Fed. 20;
U. S. vs. *Payne*, 8 Fed. 892.

(d). *The construction adopted by this Court, in its opinion, results in the confiscation of this grant and operates as a forfeiture of a vested property right, for which a valuable and money consideration was paid.*

" No construction of a treaty which would impair that security to private property which the laws

and usages of nations would, without express stipulations, have confirmed would seem to be admissible further than its positive words require."
Strother vs. *Lucas*, 12 Pet. 438.

In the case of *Chew Heong* vs. *U. S.*, 112 U. S. 536, Mr. Justice Harlan, speaking for this Court, said:

> "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, *the Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected;* and it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the Government were it to doubt for a moment that these considerations were present in the minds of its members when the legislation in question was enacted."

When the Treaty of Guadalupe Hidalgo was being negotiated our Secretary of State wrote to the Mexican Minister of Foreign Relations and said, in relation thereto and for the purpose of inducing Mexico to accept the treaty without the insertion of certain additional conditions and stipulations for the protection of its citizens, that:

> "It is our glory that no power exists in this country which can deprive one individual of his property without his consent and transfer it to another. If grantees of land in Texas under the Mexican Government possess valid titles they can maintain their claims before our courts of justice."

And, said our Secretary of State:

> "The property of foreigners, under our Consti-

tution and laws, will be equally secure without any treaty stipulations."

Again, he says:

> "And here it may be worthy of observation, that if no stipulations whatever were contained in the treaty to guarantee to the Mexican inhabitants and all others protection in the free enjoyment of their liberty, property, and the religion which they profess, these would be amply guaranteed by the Constitution and laws of the United States. These invaluable blessings under our form of government do not result from treaty stipulations, but from the very nature and character of our institutions."

As was said by this Court in *De Lassus* vs. *U. S.*, 9 Peters 133:

> "Independent of treaty stipulations, this right (the perfect inviolability and security of property) would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; to transfer lands which had been severed from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change."

And yet under the construction given to the treaty by this Court, the title to the Arivaca Grant which has been vested in the claimant and his predecessors in interest since 1812 (a period of ninety years), and of which grant he has held undisputed possession during that time, is wrested from him upon the theory that this government *intended* by its solemn contract with

Mexico to accomplish this great wrong and that Mexico was so reckless of its obligations and duties to its own citizens that it consented thereto.

The Mexican Minister at Washington, in a note addressed to the Secretary of the Interior of the United States on July 3, 1888, pursuant to instructions from the Secretary of State of Mexico, explained the understanding of the Mexican Government of that clause of the Gadsden Treaty requiring record evidence in the following language:

> "When the United States acquired a considerable part of Mexican territory, first by the treaty of February 2, 1848, and afterwards by the treaty of December 30, 1853, both governments agreed in their desire to protect the inhabitants in their rights acquired to the lands which changed national ownership and agreed to respect inviolably the concessions (grants) of lands made by Spanish and Mexican governments previous to the dates of both treaties, and in Article 8 of the first treaty and in Article 6 of the second treaty their right of ownership to all their possessions was acknowledged (recognized, sustained) and also their right to dispose thereof as they should see fit.
>
> "But the object of this stipulation was merely to put an end to the abuses that had been committed by virtue of the first treaty in the presentation of fraudulent grants, and it was never the intention to deprive the legitimate owner of a piece of land of his rights thereto merely because he was unable to furnish legal proof of the grant or its record by exhibiting his title in any case, where the archives had been destroyed by the invading United States Army."

Nor ought it to be lightly presumed, we may add,

that it was the *intention* of the high contracting parties to deprive a *bona fide* owner of his land, simply because the government of Mexico had made a mistake in the survey, which had never been discovered by either party, and hence had never been rectified, prior to the treaty. To so hold is to declare that it was the *intention* of these two great nations to make an innocent and humble individual suffer for the *mistakes* of a powerful nation.

Blackstone tells us that in construing a law we should first examine the old law, then the mischief, and next the remedy. We know that article six of the Gadsden Treaty was intended as a *remedy*. We also know that the *mischief* which it was intended to remedy is fairly and correctly stated in the letter of the Mexican Minister at Washington which has just been quoted.

The discovery of gold in California followed close upon the heels of this Government's acquisition of that immensely rich territory, and the phenomenally rapid increase in the value of property, which but a few years before had been liberally granted by the Mexican Government in square leagues and not acres, aroused the cupidity of unscrupulous land-grabbers, and in Pio Pico, who was Governor of California at the time the war broke out, these designing rascals found a willing tool to aid them in their efforts to steal property which had so suddenly become of immense value. It was proven to this Court by unimpeachable evidence in numerous instances, that said Pico had fraudulently

issued grants to different individuals after the war with Mexico had commenced and after the United States had secured possession of a large part of that territory, and that Pio Pico had antedated those grants to the end that they might be held valid under the treaty that terminated said war.

Antedated title papers were issued by Pio Pico in due form of law, and if they were to be adopted as *prima facie* evidence of title by this Government when produced from the pocket of the grantee or by his assignee, who in many cases was a *bona fide* purchaser for value, it would have been practically impossible for this Government to protect its property from gross fraud, because it was an easy matter to establish the fact that many of the records of the Mexican Government relating to land titles had been lost or destroyed, and it thus became almost an impossibility for this Government to furnish conclusive evidence that the title papers in question had been antedated.

Necessity, therefore, compelled this Court to depart from the well-recognized principles of law which it has uniformly applied in passing upon the question of the validity of a title to land in the United States when the grantee holds a patent from this Government to his lands.

The laws of the United States require that a patent to land be recorded at length in certain books which are kept in the archives of this Government at Washington, and in that manner our Government preserves

a record which gives the complete description of the land granted, and yet this Court held in the case of *U. S.* vs. *Marshall Mining Company*, 127 U. S. 569, that the recording of the patent is not essential to the validity of the title of the grantee.

In the case of *U. S.* vs. *Stone*, 2 Wall. 525, this Court said:

> "The patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patent or title until it is set aside by some judicial tribunal."

It cannot be doubted that, had this grant remained within the jurisdiction of Mexico, this claimant could have made out a *prima facie* case by simply producing his titulo and proving the authenticity of the signature of the granting officer. The absence of any trace of record evidence in the archives of Mexico would have in no way affected his title, and the burden would rest upon the Mexican Government to establish fraud by clear, convincing and unequivocal proof in order to avoid the grant.

Under the treaty of Guadalupe Hidalgo, it seems to the writer, this Court would have adopted that principle in passing upon the validity of titles to grants in California, just as it did in the early cases under the Louisiana and Florida treaties. But in order to counteract the gross frauds which had been attempted in California, the direct proof of which had been brought to the attention of this Court, it was necessarily compelled to refuse to indulge this presumption, and to

require some evidence that at least a portion of the record of a grant which was required to be made by the Mexican officials existed, or had existed in the archives, or, in the absence of any trace of such record evidence, that the grantee had been in possession of the land for a sufficient length of time prior to the treaty to avoid any suspicion of the *bona fides* of his claim.

As was said by this Court in the case of *U. S.* vs. *Neleigh*, 1 Black 306:

> "The propositions laid down in the *Castro case* and others preceding it were an absolute necessity to save the Government from utter spoliation of its territory * * * The numerous frauds which had been attempted to be perpetrated, depending upon this theory of the destruction of the records, have compelled us to reject it altogether as fabulous."

Yet in the case of *De Aro's Heirs*, 22 How. 293, a grant was confirmed without any record evidence and upon the titulo alone and proof of its genuineness, accompanied with 16 years' possession of the land.

And a careful examination of all the land-grant cases from California will disclose the fact that when the authenticity and genuineness of the title papers were not disputed by this Government, and when the grantee was in possession of the land prior to the acquisition of the territory by this Government for a sufficient length of time to repel the suspicion of fraud, that rule of necessity in regard to record evidence was never enforced.

The writer has not been able to find a single case in which that rule of record evidence was enforced by this Court when the facts of the case did not justify a strong suspicion that the title was conceived and executed in fraud; and the Court uniformly called attention to the facts creating this suspicion and to its existence, in apparent justification of the Court's action in refusing to accord to the title, standing alone, all those presumptions which it would give to a patent from the United States.

In the case of *Gonzales* vs. *Ross*, 120 U. S. 629, this Court quotes with approval from the case of *Byrne* vs. *Fagin*, 16 Tex. 391 that—

> "Where there is a testimonio there is a presumption that the original is among the archives of the land office in its proper place of deposit. At all events, it is for the defendants to show by proper proof that it is not there."

In following Blackstone's suggestion that we examine the old law, then the mischief and then the remedy, we have already seen that under "the old law" the production of the titulo itself and the proof of its authenticity would immediately raise the presumption that the grant had been "duly recorded" in the archives.

We have further seen that the "*mischief*" rested in the fact that it was comparatively easy after the acquisition of California, for Pio Pico, who had been Governor of that territory, to manufacture and antedate grants which it would be difficult to defeat under the well settled *presumptions* of the "*old law*"; and that, there-

fore, the "*remedy*", which the necessities of the times had forced upon this Court, was adopted by our Minister when entering upon the treaty with Mexico for the acquisition of the lands comprised within the Gadsden purchase. It is fair to presume, therefore, that it was the intention of both the parties to that contract or treaty that only such evidence that the grant had been duly recorded should be required, as the investigations of this Court had already demonstrated to be absolutely necessary in order to protect this Government from being despoiled of its property by fraud.

Whatever may have been the mischief against which the United States desired to protect itself by the requirement that the grant need not be respected or be considered as obligatory, unless it had been "located" prior to the treaty, it must be apparent that the minds of the two contracting parties did not meet upon the proposition that the grantee should be deprived of his property in land which had originally been solemnly located by the Mexican Government by a survey made prior to the execution of the grant and made for the very purpose of describing the particular piece of land which the Government intended to convey. To so hold is to inject the words "accurately and correctly" into the treaty, so that it will read, that no grant need be respected or be considered as obligatory which had not been "accurately and correctly" located prior to the treaty. It would seem to be more in accordance with the principles of equity and of natural justice, as well

as morality, to hold that *a grant was "located" within the meaning of the treaty; provided a survey of the grant was made by the Mexican Government prior to the treaty in good faith for the purpose of locating upon the ground the particular land which it intended to convey.*

Any bona fide attempt by the Mexican Government to locate the grant prior to the treaty ought to be considered in equity as an actual location within the meaning of the treaty. In no other way can full justice be done to individuals.

"All courts ought to feel a disposition to support a grant fairly made for a valuable consideration", says Chief Justice Marshall in *Blake* vs. *Doherty*, 5 Wheat. 362, and it is a cardinal rule that "equity abhors a forfeiture."

Third.

THE MOST LIBERAL VIEW WHICH CAN BE TAKEN OF THIS GRANT IS THAT THE GRANT IS A MERE "FLOAT". IF THE LAW OF SONORA OF MAY 14th, 1852, IS READ INTO THE TITLE PAPERS OF THIS GRANT, THE RIGHTS OF THE GRANTEE BECOME AT LEAST AS STRONG AS AND ALMOST SYNONYMOUS WITH THOSE OF THE OWNER OF A "FLOATING" GRANT SUCH AS THIS COURT BECAME FAMILIAR WITH IN THE CASES INVOLVING TITLES TO MEXICAN GRANTS IN CALIFORNIA.

A "floating" grant vested a right of property in the grantee which is protected by the Constitution of the

United States and of which he cannot be divested without adequate compensation.

Fremont vs. *The United States*, 58 U. S. 542:

"The words of the grant are positive and plain *They purport to convey to him a present and immediate interest.*" *id.*

"But although this cannot be regarded as a money consideration, making the transaction a *purchase* from the Government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration the title in a court of justice ought to be as firm and valid *as if it had been purchased with money on the same conditions.*" *id.*

"But, as between him and the Government, he had a *vested* interest in the quantity of land mentioned in the grant. *The right to so much land to be afterwards laid off by official authority in the territory described passed from the Government to him by the execution of the instrument granting it.*" *id.*

"The principles decided in this case appear to the Court to be conclusive as to the legal effect of the grant to Alvarado. *It recognizes as a general principle of justice and municipal law that such a grant* for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, *vests in the grantee a present and immediate interest.* In the language of the Court, the general gift becomes a particular gift when the survey is made; *and when this doctrine has been asserted in this court upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican Government where a controversy arises between the United States and*

the Mexican grantee." *id.*

See also *Hornsby* vs. *United States*, 77 U. S. 232, Opinion by Justice Field.

In the case at bar, *the grantee paid a money consideration to the Mexican Government for his grant*, and it would seem that *in such a case there can be no possible doubt, but that a court of equity will treat the grant as firm and valid.*

The honor of the United States Government is at stake, and this Court has frequently declared that it was not the intention of Congress to forfeit grants, or to confiscate private property or to determine the rights of private parties under the treaty in a narrow and illiberal manner, but that it is the intention of this Government and of Congress to afford protection and security to all just rights which the petitioner could have claimed at the date of the treaty from the Mexican Government.

U. S. vs. *Agricola*, 1 Wall. 358.

Under the law of Sonora of May 14th, 1852, the claimant had a clear and undisputed legal right to select his "cabida legal" at any place he chose within the boundaries described in his title papers. *This, then, was a vested right of property in the grantee at the date of the Gadsen Treaty. To deprive him of this property right is to confiscate his property without due process of law. It is to declare a forfeiture by a narrow and illiberal construction of the treaty, which was executed in duplicate, and under the Spanish version of which this govern-*

ment is in honor bound to respect and recognize this grant.

Under Mexican laws the right of the grantee was not vested in any particular two (or four) sitios of land within the boundaries described in his title papers. Demasias are defined by Art. III, Chapter I of the Mexican law of 1894:

> " To be thus held by private persons on *primordial* title and to a greater extent than specified, such surplus however being within the boundaries mentioned in the title, and, consequently, mixed up in its entirety with the area for which a title is held."

In this character of grant the Demasias were always treated as being "mixed up in its entirety with the area " for which a title was held". Of course that is only another way of stating that *the "cabida legal" is mixed up in its entirety with the surplus lands* embraced within the boundaries described in the title papers. Hence the grantee never had an indefeasible title to any particular two (or four) sitios of land within the boundaries described in his title papers, *but he had a vested right to select that quantity where he chose within those limits.*

This Court necessarily erred therefore in holding that the grant is void unless the "cabida legal" was originally nailed to the ground at some particular point within the boundaries described in the title papers.

Art. IV of law No. 197 of the State of Sonora, enacted May 14th, 1852, is as follows:

> "The holders shall have the power to select, within the boundaries stated in the grant, the principal, or main, area, which may be more suitable to them, provided that the demasias are arranged in such a way as to make them adjoin each other and form a body, thus allowing them to be sold to advantage." See translation by Dr. J. I. Rodrigues, chief translator for the Bureau of American Republics, as same appears in "ADDITIONAL BRIEF FOR CLAIMANTS" in cases Nos. 109 and 129 (consolidated), October term, 1901.

Until judicial action was taken in Mexico to compel the grantee to select his "cabida legal", or principal area, under said law of Sonora, it must be apparent that "to every and to each part of the land surveyed its "owner had an equal right", as was said by Chief Justice Marshall in the case of *Taylor* vs. *Brown*, 5 Cranch. 234, in construing a grant in Virginia, under its ancient laws which likewise provided that the grantee or patentee could "allot the surplus" in any part of the grant which he chose. The right to "allot the surplus" is the exact equivalent of the right to select the "cabida legal" or principal area. And this right was fully recognized by the law of the State of Sonora, No. 51 of May 12th, 1835, which reads in part as follows:

> "ARTICLE 2. Those are likewise *bona fide* owners who, under the description given in their records of survey, occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement

than that of paying for the excess in accordance with the quality of the land at the price which prevailed when the land was measured and appraised, and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government, upon the report of the treasurer, shall such excess be awarded to any one denouncing or soliciting it; and such person shall bear the expense of the resurvey if excess has not been ascertained. In lands measured by calculation none shall be regarded as excess that does not exceed half a sitio."

NOTE.—The foregoing is the official translation, made expressly for this Court and adopted by it in the case of *Ainsa* vs. *U. S.*, 161 U. S. 225.

And this law was not repealed by said law No. 197 of May 14th, 1852, as in Mexico laws are not repealed by implication except in so far as they are repugnant to the later laws.

Compiled laws of Mexico Vol. 3, Page 557.

In the case of *United States* vs. *Moreno*, 1 Wall. 400, this Court said:

> "A right of any validity before the treaty was equally valid afterwards. The act recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit."

And in the case of *Hornsby* vs. *United States*, 10 Wall. 224, this Court said:

> "The word property includes every species of title inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government was not changed. The government takes the place of that which has passed away."

Surely it has never been contended, and it cannot be successfully contended, that this grantee did not have a vested right of property at the date of the Gadsden Treaty.

It can make no difference that the out-boundaries of the grant are not fixed with absolute nicety and certainty. Nearly all of the floating grants in California had very loosely defined out-boundaries. The grantee who has paid a money consideration ought not to suffer by reason of the fact that the officers of the Government failed to describe the out-boundaries so that they can be identified with absolute certainty after this great lapse of time. If two sides of the grant can still be located with reasonable certainty, and those two sides meet at an angle the grantee ought to be permitted to select his "cabida legal" at any place within the angle so made by those two sides, and if three sides of the grant can still be located with reasonable certainty there would seem to be no difficulty whatever about giving to the grantee his "cabida legal" in such a way as to assure its being located within the original boundaries described in the title papers.

> "It is not necessary that the grant itself should contain such a description, as without the aid of extrinsic testimony, to ascertain precisely what is conveyed."
>
> *Blake* vs. *Doherty*, 5 Wheat. 359.

It may be suggested, however, that it has not been shown that we complied with Art. II of said law of 1852, and that therefore we have lost our right to *select*

our principal or main area under Section IV of said law. It will be noticed that the "original records of the survey" are to be forwarded to the Treasury. In this grant those "original records" were never in the possession of the grantees or their successors in interest, but were deposited in the Treasury in the first instance, and have remained there ever since. A *copy* thereof *only* was delivered to the grantees (Record, pp. 531 and 234).

This law was not intended to apply to those cases where the *original expediente* remained in the archives, but to those in which said "original records" were lost from the archives, or by some means got into the hands of the owner of the land, as was not infrequently the case.

Fourth.

THE FACT THAT MEXICO LONG SUBSEQUENT TO THE DATE OF THE TREATY WITHDREW FROM THE GRANTEE THE RIGHT TO SELECT HIS "CABIDA LEGAL" IN ANY PART OF THE GRANT HE CHOSE, AND THAT IT ASSUMED THE RIGHT TO SELECT SUCH "CABIDA LEGAL" FOR HIM, CAN IN NO WAY AFFECT THE RIGHTS OF THIS GRANTEE. THE ACTION OF MEXICO IN THIS RESPECT OUGHT NOT TO BE EVEN OF ANY PERSUASIVE EFFECT UPON THIS COURT IN DETERMINING THE RIGHTS OF THIS GRANTEE.

Mexico has not always acted according to the most enlightened views of morality or equity in its dealings with its citizens with respect to their property rights. The congress of Mexico can overturn vested rights of property and can impair the obligation of contracts with impunity. That body is the judge of the constitutionality of its own laws. But because Mexico has so done, it does not follow that it would be in accordance with equity or good morals for this Government to follow suit.

The moment this land became a part of the United States the rights of the grantee, as they existed at the date of the treaty, passed under the protection of the Constitution of the United States.

As was said by this Court in the case of *Pollard's Lessee* vs. *Hogan*, 3 How. 219:

> "*Every nation acquiring property by treaty, or otherwise, must hold it subject to the Constitution and laws of its own government, and not according to those of the government ceding it.*"

The right of the grantee to select his "cabida legal" in any part of the grant he chose, is a vested right of property which under the sturdy principles of Magna Charter and under the Constitution of the United States, and under the principles of natural justice, cannot be taken away from him without adequate compensation. This Court has held that in the absence of any constitutional provision against the impairment of contractual obligations a law which

vests a property right cannot be repealed so as to affect vested rights, and these decisions are based expressly upon principles of natural justice.

Terrett et al. vs. *Taylor*, 9 Cranch. 44;
Fletcher vs. *Peck*, 6 Cranch. 177.

For the foregoing reasons we urge this Honorable Court to recall the remittitur which it has caused to be issued in this case, and to review its decision in the foregoing matter.

Respectfully submitted,

FRANCIS J. HENEY,
ROCHESTER FORD,
Attorneys for Appellant.

We hereby certify that in our opinion the foregoing petition for a re-hearing is well founded in law.

FRANCIS J. HENEY,
ROCHESTER FORD.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE ARIVACA LAND AND CATTLE COMPANY, appellant,
v.
THE UNITED STATES ET AL. } No. 153.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

ARIBAC GRANT IN ARIZONA.

STATEMENT.

On March 1, 1893, the Arivaca Land and Cattle Company filed its petition (R., 1–5) in the Court of Private Land Claims, for the confirmation of the Aribac grant situate in Arizona, alleging the same on the trial to contain 26,508.06 acres (R., 12) or about 6 sitios. The recitals of the petition and the documentary evidence introduced by the claimants on the trial are to the following effect, and upon them the plaintiffs claimed a confirmation of the grant.

On June 2, 1833, Ygnacio and Tomas Ortiz, claiming to be sons and heirs at law of one Don Augustin Ortiz, petitioned the constitutional alcalde of Tubac, stating in their petition that in 1812 their deceased

father paid into the treasury of the capital of Arizpe 8747 and 3 reales as the highest bid for which 2 sitios of land for raising cattle were sold to him at public auction, situated in the place called Aribac, that they were not in possession of the expediente and were without knowledge of its whereabouts and praying that the depositions of three witnesses be taken whereby to prove that said land was settled and possessed from 1812 and also as to the landmarks and boundaries (R., 2, 19–20).

The alcalde proceeded to take the depositions of three witnesses—Lorenzo Carrisosa, Jose Sanches, and Bernardino Madrid—who deposed substantially that the Aribac ranch had been settled and occupied by Don Augustin Ortiz from 1812 to that time (1833), and that the landmarks designating the boundaries in the four cardinal points are: On the north, "the high-pointed hill (devisadero) that rises on this side of [southward from] the Tagito mine and borders on the Sierra de Buenavista;" the one on the south, "standing on this side of [northward from] the Longorena mine on a low hill next to a canyon covered with trees;" the boundary on the east, "standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas;" on the west, "at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra de Babuquivari." (R., 20–22.) The taking of these depositions was entirely *ex parte*, and no representative of the Government participated in the proceeding.

Ygnacio and Tomas Ortiz then petitioned the treasurer-general of Sonora, through their attorney, to grant them the 2 sitios of land at the place of Aribac, transmitting "documents by which they show their right of property to 2 sitios of land which in the year 1812 were sold at public auction to their deceased father, Don Augustin Ortiz, from whom they inherited the same, * * * and that the price at which it was sold and other imposts thereon have been paid" (R., 22). The "documents" transmitted were evidently the three depositions just mentioned and probably a certificate by the treasurer of Arizpe (as it bears the same date as the petition, R., 19), to the effect that on page 85 of the manual book corresponding to the year 1812 an entry was found, signed by Bustamente, Romo, and Jose Carillo (whose official positions, if any, do not appear), that Don Augustin Ortiz paid into the royal treasury $799, 5 reales and 9 grains for 2 sitios of land at the place of Aribac, for raising cattle, recently sold to him at auction (R., 19).

These papers, to wit, the petition to the alcalde, his order to take testimony, the three depositions, the certified copy of the entry, and the petition to the treasurer-general, were then by the latter referred to the governor of Sonora for action (R., 22, 23), accompanied by a statement of the matter which recites that "by said documents the interested parties show that in the year 1812, 2 sitios of land for raising cattle were surveyed and sold at auction to their deceased father, Don Augustin Ortiz, * * * ; that since that time

the land has been occupied without any interruption; that there exists to-day the landmarks placed at that time, and that all dues are paid to the public treasury." It may be remarked just here that, there is nothing to show that any survey was made of this tract as alleged by the treasurer-general.

The governor, with a preface that "the *possessory right* of citizens Tomas and Ygnacio Ortiz has been legally proved," then ordered that the grant be made in accordance with the law. (R., 23, 24.)

On June 24, 1833, Mendoza, as treasurer-general of the State of Sonora, orders that the title for "2 sitios of land for raising cattle which comprise the place called Aribac" be issued, and that the grantees pay into the treasury the value of the title ($30), in conformity with the laws. This amount was apparently paid in July 12, 1833 (R., 26). In view of the fact that under section 15 of the State law of May 20, 1825, the title was "given gratis" (Reynolds, p. 130); and the further fact that the law requiring the payment of $30 was not enacted until the year following this alleged exaction (Reynolds, 190; article 71 of the law of July 11, 1834), suggests the inquiry as to whether this *título* is not antedated, and also suggests the propriety of the strict enforcement of the California rule and the treaty requirement to the effect that claimants furnish full archive evidence of their grant before permitting a confirmation in this cause, a matter to be more fully discussed hereinafter.

On this state of facts Mendoza proceeds, on July 2, 1833 (R., 24, 25), to issue the title and grant for "2

sitios of land for raising cattle and horses, which comprise the place called Aribac," and declares that the expediente shall remain in his office as "a perpetual record." The record shows it is not there.

Mendoza recites as authority for the grant article 11 of the superior decree No. 70 of August 4, 1824 (Reynolds, Spanish and Mexican Laws, p. 118), and law No. 30 of May 20, 1825, of Sonora (Ibid., 129–131; R., 18).

The title paper presented has an indorsement that it is recorded on page 15 of the proper book, presumably the toma de razon of 1833 (R., 25). The record shows (p. 69) that an entry of the issuance of this title does appear in that book, but on page 1 of leaf 13, not on page 15.

An examination of the record reveals the fact that, the titulo produced from private custody and the entry in the toma de razon of 1833 constitute the sole evidence of the grant. The expediente of 1812 is not in the archives nor is there found any trace or remembrance of it; the alleged entry of October 10, 1812, copied in the titulo, is not there; the expediente of 1833 is not there. The document introduced in evidence is a titulo (or copy of the expediente) which comes from the Surveyor-General's office, having been deposited there by the then claimants of the grant in their proceedings before that official in 1880, under the provisions of the act of Congress of July 22, 1854 (R., 3). Thus the sole record evidence of this grant is the brief toma de razon thereof, found on a page of the "proper book," different from that recited in the titulo.

The petition filed in the Court of Private Land Claims contained the further allegation that under the provisions of the act of Congress of July 22, 1854, the grant was investigated by the surveyor-general of Arizona and by him recommended to Congress for confirmation, but that no action was taken thereon by Congress or by any authorities of the United States (R., 3, 4); that the said grant was duly recorded in the archives of Mexico (R., 4); that all the steps and proceedings taken on the sale of the said land were regular, complete, and in due and full conformity with the laws, regulations, and customs then in force for the conveyance of land by grant, and vested a complete and perfect title in fee in and to said lands in said grantees (R., 4); that the petitioner is entitled to a confirmation of said grant in accordance with the metes and bounds set forth in the *original surveys and grants* of the same (R., 4), which original survey, it will be recalled, does not appear in the record. The adverse claim and holding of portions of the grant by the respondents other than the United States is set forth, and, with other allegations, the petition closed with the usual prayer for relief.

The answer of the United States (R., 6–9) puts in issue the material allegations of the petitions, and contained the following affirmative averments:

That whatever proceedings may have been taken toward procuring said grant in 1812, the same were never carried to final title of the grant, and the title never passed from the Spanish Government (R., 7).

That the proceedings of 1833, if had and taken, were without authority of law and void (R., 7).

That if the said alleged grantees paid the expenses of said proceedings as alleged, amounting to $30, the same was in violation of and contrary to the terms of the law under which it is alleged said pretended title was issued, in this, that said law required that such titles as it authorized to be issued should be gratis, and no law existed for the payment of such fees prior to 1834 (article 71, Reynolds, 190); that said payment was evidently made under the provisions of said law, and that therefore said grant was antedated, and not made, if at all, upon the date it purports to have been made (R., 7, 8).

That under the provisions of the law of the National Government of Mexico all persons in possession of lands in the years 1833 and 1834 were required to present their titles or claims to the National Government for confirmation and examination within the space of six months, and failing to do the same, they were forfeited and abandoned to the Government; and this failure of the claimants so to do is pleaded as a bar of any remedies the claimant might have against the Mexican Government and the United States (R. 8).

On February 13, 1899, the claimant filed an amended and supplemental petition pursuant to leave of court (R. 9) which contained the following:

> That prior to the treaty known as the Gadsden treaty no resurvey of said grant had ever been applied for or ordered by anyone, and that neither of the grantees or their successors

in interest had prior to said treaty any knowledge or notice that within the said monuments there was an excess of land over the area stated in said title papers, and petitioner avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora, existing at the date of said treaty, and for a long time prior thereto had been holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale, as recited in said title papers, did not, as petitioner avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers, without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from it for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum therefor is ascertained. (R., 38.)

And a tender of $300 in gold coin was made to the United States as payment for such overplus or excess, and $200 for the costs of ascertaining the same. (R., 38, 39.)

A trial and submission of the case was had in 1895 (R., 10–18), but the latter afterwards set aside (R., 39), and further hearing had. (R., 39–69.)

The evidence presented on the trial, in addition to the documents already presented, was directed entirely to the question of the location of the grant and upon the case as made by the evidence in this issue, the court (R., 70) rejected the grant because there was such uncertainty as to the land which was intended to be granted as to render it impossible now to identify it.

Justices Reed and Fuller advanced the further reason for rejection that the grant was not recorded as required by the treaty. Justice Murray, concurring in the result, was of the opinion that the grant is duly recorded in the archives of Mexico.

From the majority opinion Justices Sluss and Stone dissented, and a lengthly opinion was filed by Mr. Justice Sluss (R., 72–78) in support of his views, in which Mr. Justice Stone concurred.

The grounds of the decision involves a statement of the oral testimony on the trial. The witnesses for the claimants were two—Ignacio Bonillas in chief and George J. Roskruge in rebuttal. The names of these witnesses are already familiar to the court as borne by the two surveyors who have invariably been called by claimants in these Arizona cases to sustain their remarkable and extravagant surveys; and in view of the professional connection of these witnesses with this whole litigation, the suggestion of opposing counsel in his brief that Bonillas, the principal witness for claimant in this case, is "a wholly disinterested person" (p. 9) must have been intended as humorous, as indeed it is.

The survey of Bonillas, as might be expected, includes several times the quantity named in the title

papers. In this instance, however, the quantity surveyed is comparatively modest in its excess; in the San Rafael de la Zanja and Agua Prieta surveys now before the court he surveyed ten times the area granted; in the present case only three times that area.

After stating his qualifications and experience (R., 10, 11) Mr. Bonillas testified to the genuineness of the signature of Jose Maria Mendoza attached to the *título* presented, a point not controverted by the Government (R., 11). He also testified (R., 12) to a survey of the Aribaca grant made by him in February and March of 1894, by which he found the area to be 26,508.06 acres, this survey having been made by triangulation (R., 12), and without regard to the area named (R., 17). Postponing for later consideration and to be considered separately the several boundary calls, the only other features of the testimony of this witness sufficiently material to justify its being stated is the following: He testified that, the recitals in the patent by Mendoza without the testimony of the witnesses taken before the alcalde upon the petition of Tomas and Ignacio Ortiz would not enable him to locate the grant (R., 15, 16), in which connection is to be noted the mutual admission of counsel (R., 14, 17) that they had been unable to find the expediente of this grant, either that of 1812 or of 1833, in the archives, it thus resulting that Bonillas' ability to locate the grant at all was admittedly derived from a paper outside the archive evidence of this grant, a fact most pertinent to the inquiry to be presently made as to

whether this grant was "duly recorded" under the Gadsden treaty. He further testified that the form of the records at Hermosillo on all regular land grants is the retention of the expediente on file in the archives, and the making of a toma de razón of the title upon its issuance, the title as issued consisting of a copy of the expediente with the granting clause attached (R., 16).

The location of this grant by natural objects turns upon the *situs* of five descriptive calls, which, with the testimony of each witness applicable thereto, will now be considered seriatim.

1. The old town of Aribac, described in the title as "the old and depopulated town or settlement called Aribac."

Bonillas testified (R., 12) to the location of this place as being at the point indicated on his map found opposite page 30 of the record, and being thus about a mile and a half from the present town of Aribac along the road. He based this testimony upon inquiries made from people who have lived there and others who have traveled along that road, and also upon the fact that ruins of houses are to be seen there (R., 12).

Henry O. Flipper, special agent of the Department of Justice, testified on this point (R., 48) that the present village marked Aribaca appeared to be older than the place marked "Old Aribaca" by Bonillas, there being at the former place ruins consisting of mere mounds of stone, and thus indicating greater age than the existence of fallen-down houses. Another reason

for believing the original Aribaca to have been at the site of the present village is the fact that the only agricultural lands in the valley are at the present village, and that it was thus a much better place for settlement than the point selected by Bonillas (R., 48, 49).

Charles Bent, miner, called for the Government, testified (R., 53) as to his having lived in the Aribac country for some fifteen years after 1874, at which time there was no one living there but a solitary sheep herder and he did not claim under the grant; that the original town of Aribac was generally considered as being located where the present town is, and there are more adobe houses at the present town than below (R., 54).

John Bogan, county assessor, called for the Government (R., 57), testified to the same effect.

N. W. Bernard, county supervisor, also called for the Government (R., 62, 65), testified that in his opinion the point called by Bonillas "old Aribac" was the original settlement, although he admitted that the older ruins seemed to be at the present town, where also the valley is wider (R., 62, 63).

George J. Roskruge, called for claimant, testified to the location of old Aribac at a distance of a mile and a half from the present town. While the transcript is not entirely clear, it is probable that the point at which he fixes the old settlement is the same as that adopted by Bonillas, to wit, about a mile and a half down the river or west from the present settlement (R., 66, 68).

While it is not believed that the location of the old

place of Aribac as between the two points testified to by the witnesses is of any importance, since it is not pretended that the place was the center or initial point of the primitive survey, the difference between the witnesses is useful, as it emphasizes the uncertainty in attempting to locate, in a wild and unoccupied country, natural objects of the vagueness named in the *titulo*, and as thus affording strong support to the conclusion of the court in finding this tract incapable of identification.

2. The north boundary, stated in the *titulo* to be on the high pointed or lookout hill (devisadero) that rises on this side of the Tajito mine, and borders on the Sierra de Buenavista.

The controlling calls here are the Tajito mine, the Sierra de Buenavista, a lookout hill.

Bonillas testifies that he was unable to locate the Tajito mine (R., 12); that nobody had ever heard of the Sierra de Buenavista (R., 12); and that so far as the existence of a lookout hill is concerned, "there are a number of hills that would answer that description" (R., 13). He justifies his having gone miles north of the Aribaca River for a lookout hill, on the ground that on that hill is an old pile of stones that is *not* a United States official monument (R., 13), and he argues the age of this and the other piles of stones upon which his whole survey depends, from the fact that some of the rocks are mossy and "are almost covered with sand the wind has carried there" (R., 17). The foregoing, which is believed to be a fair statement of

the testimony of this witness as to the location of the north boundary of this grant, and the only witness, be it remembered, produced by claimant to locate it, is a sample of the testimony by which it is sought to wrest from the United States the patent for a valley occupied by hundreds of people (R., 54) engaged in mining and agriculture, and, in many instances, holding under homestead and other title from the United States (R., 61).

Flipper, who made an examination of the Bonillas survey on behalf of the Government in November, 1899 (R., 40), identified the Bonillas north boundary, as well as the other Bonillas boundaries, with the aid of R. N. Leatherwood, one of Bonillas's assistants (R., 41, 66), and also by the markings placed on the rocks by Bonillas (R., 41, 47). Mr. Flipper testified as to this alleged north monument (R., 41) that he found it on a high ridge about 2½ miles from the town of Aribac, at the northern extremity of the Guijas Mountains, the monument being one of two low piles of stones, a few feet apart, found at that point: that said pile is artificially built on the outcropping from the side of the hill (R., 42), and this, as the other monuments, is very recent (R., 45, 47, 49): that this monument is not on a look-out hill, but on a ridge (R., 42, 52), and one can not overlook the Aribac Valley from it, the Guijas Mountains being between (R., 42): that considering the Guijas Mountains to be the same as the Buenavista Mountains named in the *expediente*, it is evident that this is not the hill contemplated by the titles, since

under the description the monument was to be between the mountains and the river, whereas the Bonillas north monument is on the north side of the mountains, leaving most of the latter inside the grant (R., 42, 43). Mr. Flipper further testified, as did Bonillas, that there were a number of other *devisaderos*, or points from which a lookout might be kept for Indians, (R., 42, 51) in that vicinity (R., 43), among them being the point marked "Red Hill" on the Bonillas map, and another known as "Telegraph Hill," on which United States land monument No. 5 is located, as shown on the Bonillas map, and also two or three other sharp peaks answering to the name of *devisaderos* (R., 43). On Telegraph Hill there is a large monument, now Location monument No. 5 (R., 43), but, as will be presently seen from the testimony of the witness Bogan, this monument existed prior to its establishment as such Government monument (R., 58). On the Red Hill just mentioned there is a monument fully as tall as witness (R., 51), and piles of stones are found on all the prominent elevations (R., 46). It thus clearly appears from Mr. Flipper's testimony that the point selected by Bonillas is not a *devisaderos*, whereas there are in that vicinity a number of *devisaderos* with piles of stone on them. There is absolutely no testimony, however, either in the nature of tradition or otherwise, showing which *devisadero* was meant by the witnesses of 1833. The Buenavista Mountains do not fix it; they are not known. The Tajito mine does not fix it. Flipper agrees with Bonillas (R., 42, 51) that no one knows where this is or was

in 1833. The pile of stones does not identify it; there are piles of stones on all of these high hills. Unless we are to resort to absolute conjecture and speculation, it must be held, with the court below, that claimants have not fixed their north boundary.

Witness *Bent* testified to the abundance of these piles of stones all over that country, ascribing the fact, as did Flipper (R., 46), to the ancient mining operations in that country and the erection of Indian fortifications (R., 45). Witness mentions the fact that there are a number of large lookout hills north of the river, among them that on which monument No. 5 is located, that monument having been a very old one as far back as 1875.

John Bogan likewise testified to an acquaintance with the country since 1878, during which time he had become acquainted with "every hill, canyon, and valley" in the vicinity. He testified with Bonillas that he had never heard of the Tajito mine or the Buenavista Mountains. (The stenographer's notes are misleading on this last point.) He also testified as to the existence of a number of hills or *devisaderos* northwest of Aribac, the Gijas Mountains being all hills or peaks commanding a view of the Aribac Valley up and down the river. Witness testified to his knowledge of Telegraph Peak as located about three-quarters of a mile north of the river and as that upon which United States location No. 5 is situated; that said location monument was built in 1884, but that prior to its erection there was an old monument there

and the mineral monument was built on top of the other monument, witness being present at the time, and that this hill and monument are very commanding, showing a view up and down the valley (R., 58). Witness testified to the existence of numerous other *decisaderos* or lookout hills in the section north of the Aribac River, with old monuments on them. He mentioned among these Red Hill, shown on the Bonillas map, and also three other peaks in the mountains north of the river and between the Red Hill and Telegraph Hill (R., 58). These were indicated on the Bonillas map used on the trial by the letters A, B, and C, but do not appear on the map as embodied in the printed transcript.

In Bogan's examination appears the following (R., 60):

> Q. What would you say of a description which says, being on a high lookout hill, which is this side of the Tajito mine and is bounded by the Buenavista Mountains—what would you say as to that description? Does that apply to only one place or a number of places within your knowledge?
>
> A. A number of places.
>
> Q. A number of places fill that description?
>
> A. Yes, sir.

Witness further testified that looking from the Bonillas' lookout point, nothing can be seen of the Aribaca Valley north and south (R., 62), a very important circumstance when the purpose of the alleged concession and all the surrounding topographical features are considered.

N. W. Bernard testified to the existence of Telegraph Hill as a *derisadero* to the north of Aribac, from which one could see the whole of the Aribac Valley for 25 miles, and also as to the existence of an old pile of stones located thereon (R., 63). Witness testified to having gone with Bonillas to the west center, south center, and east center monuments (R., 64, 65), and to the fact that Bonillas *put the monuments up himself* in the presence of witness (R., 64). This testimony from a man of the personal and official standing of Mr. Bernard that Bonillas *built* the monuments upon which his survey is so largely based would seem to have called for some denial from Bonillas, but none was given. No wonder these monuments appeared to Flipper on his visit in 1899 to be "recent."

3. The south boundary, stated in the *título* to be a monument "standing on this side of the Longareña mine on a low hill (loma) next to a canyon covered with trees."

The elements of this call are thus a low hill next to a canyon covered with trees, and situated somewhere between the Longareña mine and the Aribac settlement.

Bonillas testified (R., 13) that the Longareña mine "is well known even to the present day," and that he went to the mine and that looked toward the north. There is only one gulch, the Marquita (Fraguita), and looking for a monument on this gulch, witness found a very large old monument on a low hillock "just exactly as described," and that this monument is

nearly in line with old Aribac and the lookout hill taken as the north boundary (R., 13), the reliability of which has just been discussed.

This, briefly but it is believed fairly stated, is *all* the testimony which claimant furnishes to carry this grant to the south boundary selected, and thereby to include at least 15,000 acres more land than there is any pretense was paid for. The calmness with which Mr. Bonillas's testimony of a few sentences is submitted, as if his *ipse dixit* were sufficient, is impressive, but it is not believed conclusive, especially when it is recalled that Mr. Bernard saw witness build this very monument.

It is not believed that, this very vague and uncertain testimony needs any contradiction, but it is submitted that the testimony of the Government witnesses will make very evident what already appears from claimant's testimony, that there is no such identification of the boundary call as to justify its adoption.

Mr. Flipper testifies (R., 45) that the mine which Bonillas identifies as the Longareña is really a modern mine of that name, having been so located in 1877, or thereabouts, and that he could find no one who knew of a mine bearing that name previous to 1877; that so far as the call for "a small, low hillock (loma) near a valley full of trees" is concerned, there is to be found on the south side of the Aribac River not only the Fraguita Gulch or wash, to which Bonillas referred, but also one equally well known called the Yellow Jacket wash, and that there are trees along its entire

length, resulting from there being water in it, and there are also lomas or hills along its entire length and on both sides of it, with piles of stone to be found all along the wash (R., 46). Witness testifies to the very recent character of the Bonillas monument and identifies a photograph of it as well as of the others taken by him A glance at these photographs, which appear in the original transcript in the clerk's office, will show the very modern nature of these "monuments" of stone. Not only is the appearance of these monuments recent, but the places in the ground from which the stones were taken for their construction were apparent to witness (R., 49).

Witness stated that assuming the Longareña mine of 1833 to have been at the same place where the location of 1877 was made, then the south boundary would be at some point between Aribac and that mine, but whether it would be closer to Aribac or the Longareña witness could not say; and that on the canyon near the mine there are trees and low hills the whole length of the canyon and the latter are found on both sides thereof (R., 50). Witness testified that the Bonillas monument was placed not on a loma, as required by the titles, but on a small mesa or table-land covered with slaty rock (R., 48, 50, 53).

Witness *Bent* testified to the fact that on the hills and elevations on the south of the Aribac Valley are to be found innumerable piles of stones in every direction, the "country being full of them" (R., 54); that he knew the Longareña mine first in 1877 and knew the parties who located it, and it was located under that name, but

that if it had any name before its location witness did not know of it; and this, although prior to its location as the Longareña, witness had himself had it located, but under another name, thus showing that the name ascribed to it by Bonillas was not by any means the one it had always borne. Witness also testified with Mr. Flipper as to the existence of the Fraguita and Yellow Jacket canyons between this mine and Aribac, that these canyons have trees, that they are also fringed with hills, and that upon these are a large number of piles of stones, whose presence is due to a large extent to the fact that the country has been taken up with mining claims (R., 56).

Witness *Bogan* testified (R., 59) to his acquaintance with the country south of the Aribaca River for some miles, and to the fact that the Longareña mine first went by that name when it was located by one Ben Burgin in January, 1877. He also testified as to the existence of numerous small hillocks along valleys full of trees between the mine and the river, mentioning the Yellow Jacket gulch as one of these, and the fact that there are numbers of piles of stone to be found on these low hillocks in these valleys (R., 59). In his examination the following is found:

> Q. Well, the descriptions says that there is a pile of stones on a small, low hillock near a valley full of trees. From your knowledge of the country does that convey to your mind any definite place where such a location can be found?
>
> A. No, sir; it does not.

Q. Are there few or many such small, low hillocks in the vicinity that would answer that description?

A. Many.

Mr. Bernard testified (R., 64) that he knew of the Longareña mine, it being the one located by Ben Burgin; that he had never heard of an old mine by that name; that there are a great many old mines out there, but Burgin located this and gave it that name. Witness testified also (R., 64–65) to the existence of three or four valleys south of the Aribaca River with trees in them and piles of stones found abundantly on the elevations along the valleys (R., 65).

It is believed that, even assuming the Longareña mine to have been in 1833 where claimant contends—an assumption that the record does not for a moment justify—the call for a boundary on one of the innumerable lomas found in the 2 or 3 miles intervening to the Aribaca Creek does not afford any sufficient basis to support a judgment fixing any particular one of such lomas as the boundary.

4. The east boundary, described in the *título* as standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas.

The call is thus for a marked mesquite tree somewhere above the spring and on the edge of the Sierra de las Calaberas.

Bonillas testifies (R., 13) that he found a spring about a mile up the valley from old Aribac, a physical fact that is not contested; he does not claim to have

found the Sierra de las Calaberas or to have ever heard where it is; the nearest he could come to a marked mesquite tree was a stump of a mesquite; and the nearest to a monument at that tree was a large pile of stones about 500 feet distant therefrom. He testified to having found a little chain of mountains crossing the valley at right angles about 4½ miles up the valley, which it is assumed that he took as his Sierra de las Calaberas, although he does not say so, and even this is, according to his testimony, about a half mile from his mesquite stump (R., 13), which is thus hardly to be considered on the edge or border of this mountain.

It can hardly be conceived that a boundary location such as this, failing in every detail to conform to the titulo, needs any testimony to combat it.

Mr. Flipper, however, testifies affirmatively (R., 43) that these mountains are *not* known as the Calaveras, but the Pajarito Mountains, and that no one in that section had so far as he could ascertain ever heard of the Calaveras Mountains; that Mr. Bonillas's monument is on the edge of a mesa about a quarter of a mile north of the Aribaca Valley and about midway between two large black-oak trees. Mr. Flipper very forcibly shows (R., 44) that while the titles place this monument up the valley from the spring, the Bonillas monument is a quarter of a mile *out of* the valley and north of it and about 4 miles southeast from the spring, and that the nearest thing in the way of mesquite trees are three mesquite stumps without marks of any kind about 200 yards northwest from the monument,

the center stump being 200 yards farther out of the valley than the monument; and that the oaks are both larger than the mesquites. It is quite evident that had the east boundary been located as claimed the identification of it would have been by reference, not to a mesquite tree an eighth of a mile away, but rather by reference to the oaks, at whose very base it was. Referring to the pile of stones adopted—not to say erected—by Bonillas, Mr. Flipper testifies that it is a modern monument, and, as illustrating its unreliability as a boundary call, he shows (R., 44) that within 300 or 400 yards were to be found no less than thirteen similar piles of stones, and that there was nothing peculiar in the piles of stones referred to by Bonillas, except the fact that they had been built up, piled up high, recently. (R., 45.) As to the general formation of the Pajarito Mountains, witness stated that they were characterized by rough, large bowlders of gray sandstone, but that while *calaveras* means skulls, there was nothing about these bowlders to suggest skulls. (R., 52, 53.)

Witness Bogan, asked about the Calaveras Mountains, stated that he had never heard of them, and that there are, in fact, no such mountains in that country (R., 60); that while he knew a spring up the Aribaca Valley, he had never known a marked mesquite tree up there.

He further testified as follows (R., 60):

> Q. From your knowledge of the country, could you take this description and find it up

the valley from the spring at a mesquite tree which has a cross and is bounded by the Calaveras Mountains, could you locate such a description as that?

A. No, sir.

Q. Would the fact that there was a pile of stones within a hundred yards enable you to make any such location as that?

A. No, sir.

Q. What as to the presence or lack of such piles of stones in this valley above the spring, are there many or few?

A. There is a good many.

Q. When you first went there, in 1878, what as to the presence of piles of stone in those localities?

A. There were many there then.

This witness further testified (R., 62) that the valley about 4½ miles above the spring is crossed at right angles by a small range of mountains, called the Pajarito, these being the first chain encountered going up the valley.

It was contended by claimant on the hearing, and seems to be urged in its brief, that this fact fixes the east boundary, since the mesquite tree mentioned is recited to border on the Calaveras Mountains, and this, being the first mountains encountered, must be that intended by the titulo. Claimant, however, overlooks the fact that the tree referred to might be on the edge or border of an elevation running parallel with the river instead of perpendicular to it. As is shown by the plats in evidence (both that of Bonillas and that of

Roskruge, to be presently considered), there are elevations both north and south of the river to which this name might have been in 1833 applied, and, indeed, Roskruge's map, in so many words, shows the Sierra de las Calaveras to be a range running on the south side of the Aribaca River and parallel to it. This is a thoroughly reasonable theory, since it obviates the necessity of assuming that these mountains above the spring, which are now so well known as the Pajaritos, were sixty-seven years ago called by an entirely different name. It further obviates the absurdity that supposes that if these mountains were situated as claimant contends, the old witnesses would have selected a mesquite tree at their foot as marking the boundary and not the mountains themselves. It is evident that had they constituted the eastern wall of this grant—the first obstacle encountered in going east—they would have been named as the east boundary and not an insignificant tree at their base. Whatever may be thought of Roskruge's other theories, his location of the Calaveras Mountains is much more reasonable than that now urged by counsel for claimant.

5. The west boundary, fixed in the titulo as standing at the Punta de Agua on a *devisadero* opposite the Sierra de Babuquivari.

The three controlling elements here are a *devisadero* or lookout hill, the Punta de Agua or place where the water disappears in the sand downstream from Aribaca, and finally the mountains just named. The last is a well-known mountain range many miles to the west of

the tract in question, and as any *devisadero* or prominent hill in that country would be opposite to it, it is not a controlling or, indeed, helpful element of description. This boundary, then, reverts to the two elements, a *devisadero* and the Punta de Agua. Neither of these are certain, for the reasons to be presently developed. First, that there are as many *devisaderos* to the west and south of the river as we have seen there were in the direction of the north boundary; and second, the point at which the water in the stream disappears is a variable one, dependent upon the time of the year, and indeed the character of the year, as to its being dry or otherwise. In fixing this call, as in the others, Bonillas seems not to have experienced the slightest difficulty. He states (R., 14) that he went to the west to the Punta de Aqua and there upon a very high hill, "at the proper place," he found a very old monument and that standing at the old ruins, and looking toward this hill it is seen toward the Babuquivari mountains, which form the background. This is, concisely stated, all of claimant's testimony on the subject.

Mr. Flipper testified (R., 47) that he went to Bonillas' so-called "very old" monument and found it to be a recent one, with no moss on the lettering, which is in English. Witness was also at the point of water, and at the date of his visit (November 18, 1899, which is in the wet season in southern Arizona), the end of the water was about a mile and a half *up* the creek or eastward from the point adopted by Bonillas. He found a number of other *devisaderos* along the north extremity of the range and eastward from that

selected by Bonillas, with old monuments along them (R., 47), and the only distinguishing feature of the latter was the fact that it was more isolated and the farthest west (R., 47). Mr. Bogan (R., 60) likewise testified to the fact that going northwest from Aribac and on the south side of the river there are a number of lookout hills and prominent peaks, at least a dozen, and there are numerous piles of stones on these peaks (R., 61). This concluded the oral testimony on this subject.

BRIEF AND ARGUMENT.

The Government's contentions are:

First. That this grant, if considered one by name or by natural objects, is so vague, uncertain, and indefinite as to be incapable of location.

Second. That if considered one for the quantity named it is likewise void for uncertainty.

Third. That upon the record this is not a grant lawfully and regularly made under the laws and regulations in force in Mexico.

Fourth. That the pretended grant was not located or duly recorded as required by the Gadsden treaty.

I.

This grant, considered as one by natural boundaries or one of a place by name, is void for uncertainty.

Under the laws prevailing at the dates named in the titles there was no provision for grants *ad corpus* As has been fully discussed and determined by this court in Arizona cases heretofore decided, the entire system was one of sale *ad mensuram*, of a given quantity in

sitios for a named price per sitio. There is thus no ground for claimant's contention that this grant is one either of a place by name or one by natural boundaries. Assuming it, however, for purposes of argument to have been either, it is void for uncertainty in the description.

The familiar rule, of course, is that the description of the premises conveyed must be sufficiently definite and certain to admit of identification of the land; otherwise it will be held void for uncertainty. (2 Devlin on Deeds (2d ed.), §1010; Spaulding on Public Lands, p. 272; *Boardman* v. *Reid*, 6 Pet., 328; *United States* v. *Lawton*, 5 How., 10; *Smith* v. *United States*, 10 Pet., 326.)

Does the description in the proceeding of 1833, in the light of the evidence, identify the land? It is believed the statement and discussion of the testimony above set forth shows that it does not; and that there is absolutely no guide afforded by the record that will enable the court to say what hill constitutes the north boundary, what mesquite tree the east boundary, what pile of stones the south boundary, or what *devisadero* the limit on the west. The testimony has been so fully discussed hereinbefore that little attempt will be made to add anything here. It seems to be urged by claimant, however, in its brief (p. 9) that the testimony of Mr. Flipper, as found on pages 48 and 50 of the record, is sufficient to locate the grant. His testimony is as follows:

> After going over the ground thoroughly—and the description in the title papers is exceedingly indefinite—after going over the ground

and with this description I am prepared to say that I can not locate the grant absolutely but approximately. I think I can locate what I believe to be the north line, and the east line, and the west line.

Mr. Flipper then testifies:

I think the east center monument is up the valley—farther up the valley than this spring.

If this affords claimant a satisfactory solution of its east boundary it must be very easily satisfied. Its east boundary is undoubtedly above the spring, but where? Is it a half mile, 2 miles, or the full 4 miles taken by Bonillas? Certainly the record does not afford any solution of this uncertainty.

But it is contended that Mr. Flipper, by his testimony on pages 48 and 50, settles the west boundary. He says (p. 48):

I think * * * the west center monument *probably* is the same one that Mr. Bonillas took. What is described in the title papers as the point of the water is a movable point. The point where the water stops running is farther up or down the creek, according to the season of the year.

And on page 50:

Q. In effect you testified that this west center monument answers the call?

A. I think that monument would answer the call.

Q. You say this description is very indefinite?

A. Yes, sir; it is exceedingly so, compared with descriptions of lands in other titles. There

is no survey. He does not give courses and distances.

This testimony of Mr. Flipper, when construed with the rest of his testimony, does not state that the original west boundary is where Bonillas put it. All he says is that, that point "would answer the call;" and so would any one of the dozen other divisaderos on the south side of the river mentioned by witness Bent, taken in connection with the constantly changing "end of the water," testified to by Mr. Flipper as a movable point.

Upon the south boundary it can hardly be contended by claimants that Mr. Flipper's statement (R., 48) that this "is somewhere south of the Aribac Creek, I do not know where," is a location, or that his suggestion that the north boundary line should run parallel with the general course of the river affords any solution of the question of the distance at which it should be run from the river, whether through the Bonillas monument, the Red Hill, Telegraph Hill, or one of the many other monumented divisaderos. Counsel's argument that the north and south boundaries should be run equidistant from the river is ingenious, but is more suggestive of a location *de novo* than an identification of old boundary calls. Counsel, on page 12 of his brief, dwells with great approbation on the dissenting opinion of Mr. Justice Sluss, and in the excess of his approval makes bold to assert that the opinion of the majority was "without an examination of the evidence." It is believed that this court will find in the record the

amplest proof that the evidence was discriminatingly considered by the majority of the court below, and that conceding that all the descriptive elements to which the learned dissenting judge refers in his opinion are "there," such elements fall very far short of identifying the tract. At the risk of repetition, it may be suggested that while, as the learned judge suggests, the *punta de agua* is "there"—at one season—it is a mile and a half away when Flipper goes there at another season—a case of "now it is and now it isn't;" and that while "the canyon covered with trees" is there, not one, but *three*, canyons answering the description are "there;" and what further complicates matters is the presence along these canyons of a thousand and one little hills of the description given in the titles upon which the original pile of stones *may* have been put. The ample opportunities for conjecture as to the location of this grant are illustrated by a comparison of the surveys made for claimants, respectively, by Bonillas, already discussed, and that made for claimant by Oury and referred to as Exhibit A in claimant's petition. (R., 3.) While this latter map was inadvertently omitted from the transcript, the original has been filed with the clerk of this court for consideration as a part of this argument. It is respectfully submitted that the court below was right in declaring the grant void for uncertainty.

II.

Considering this a grant for the quantity named, to wit, 2 *sitios*, it is still void for uncertainty.

If this is a grant of 2 *sitios*, where are such *sitios* located? What is there in the record to tie them to any particular land? There is no original survey or field notes to afford a guide; there is no center or initial point as in the other Arizona grants; the exterior boundaries, as has just been shown, are incapable of identification.

It was with the view of supplying a theory as to the proper location of 2 sitios that claimants produced Roskruge on the hearing (R., 66–69) to testify to a survey made by him in 1881 for the surveyor-general of Arizona. The plat of that survey was omitted by the clerk from the record, but the original has been filed with the clerk of this court for its consideration should it deem proper to do so. Roskruge testifies that his survey embraced 8,680.52 acres, or 2 sitios, and included old Aribac and the present town of Aribac, also the running water on the grant and all the valley (R., 67); that it runs about 2 miles above the present town of Aribac or to about a mile above the spring (where the water begins in the river) and about 3 miles below the town of Aribac and thus some distance short of the Bonillas's west boundary, which, according to Bonillas, is the limit of the water in that direction. Thus Roskruge included some of the dry portion of the grant toward the east and left out some of the water on the west end. His location was thus entirely arbitrary, as indeed he admits (R., 68) where he says:

> I surveyed the 2 leagues of land. It was left a good deal to me. They wanted it for cattle

raising in that valley. I used my own judgment as to where to locate it.

As Roskruge admits (R., 69) that he is not a cattleman, but simply a surveyor, his judgment as to what constitutes a proper 2-sitio cattle ranch is hardly instructive, much less persuasive, upon the court. Grazing is as important as water for cattle, and Mr. Flipper's testimony (R., 48) shows that there is excellent grazing at the east and west ends of the grant, and thus in the very portions which Roskruge has left out of his ideal ranch. If the realm of conjecture is to be entered into, it is believed that many more plausible theories as to the form and location of these 2 sitios from the standpoint of the cattleman can be presented to this court than that suggested by Roskruge; it is safe to say, at least, that many equally plausible might be conceived, and all of them equally consonant with the purposes of the original concession. It is respectfully submitted, however, that it is no part of the duty of this court to enter into the domain of speculation as to the proper shape and location of a 2 sitio cattle ranch of 1833, whether it shall be a league wide by two long, as in the San Rafael del Valle grant, or less than that in width and more in length, as in some other grants; whether it shall cover the west end, where the water is most abundant, or the east end, where the pasturage is best. It was never intended by the *Ely Case* (71 U. S., 220, 241) to declare it to be the power of the court to make locations of grants, but simply to declare the original location. That decision

does not authorize the arbitrary fixing of boundaries, but simply declares it to be the duty of the court, if there be facts enough, to "*determine the true boundaries* of the tract as granted."

It is respectfully submitted that this claim, whether considered one by metes and boundaries or one for the quantity named, is not supported by facts sufficient to enable the determination of the true boundaries of the tract granted.

III.

THIS IS NOT A TITLE LAWFULLY AND REGULARLY DERIVED FROM THE GOVERNMENT OF MEXICO OR THE STATE OF SONORA.

At the very outset of the investigation of the title asserted, we are met with this question, from which Government, Spain, Mexico, or the State of Sonora, was this title derived? To what land-tenure system and to what laws shall we look to determine the legality and regularity of its derivation? The laws of the former Government applicable to the case are domestic laws and the acts of the officials are to have their validity tested by them. The requirements as to jurisdiction imposed by the act of 1891 are mandatory and no claim is entitled to recognition which is not brought within each and every provision of that act. This claim must rest for its recognition upon a compliance with the laws of Spain or Mexico or some State of the Republic of Mexico having lawful authority to make grants of lands. The burden is upon the claimant to show that his title conforms to the requirements

of the laws of the country from which it is derived, and that it is thus entitled to recognition from the United States.

> *United States* v. *Coe*, 170 U. S., 697; *United States* v. *Ortiz*, 176 U. S., 422; *United States* v. *Elder*, 177 U. S., 104.

The proceedings under which this title is asserted have already been outlined. From the titulo it appears that the heirs of Ignacio Ortiz took testimony before an alcalde as to their father's rights. As intimated in *Whitney* v. *United States* (167 U. S., 547), this proceeding was ineffectual as against the Government, the latter not being represented or in any way a party to it. These *ex parte* depositions were presented to the treasurer-general with a petition by the claimants for the issue of a grant to them under the provisions of article 27 of the law of May 20, 1825 (Reynolds, 131). That law provides:

> 27. Those who possess sitios, and who, although they have them registered and surveyed, have not obtained the title, shall present themselves to the treasurer-general and shall state in writing the cause of that failure, the deputy or judge who made the survey for them, and the payments they made.
>
> 28. The treasurer shall fix for this purpose the time that seems to him proper, and, as soon as he gets all the information together, shall render a report to the Government, which shall order the proper steps taken with regard to the rights of the parties in interest and those of the treasury.

Notwithstanding the fact that the proof presented to him failed to show the survey of the tract or the deputy or judge who made the original survey as required by that law, the treasurer-general referred the matter to the governor of the State on June 21, 1833, and the latter on June 22, 1833, ordered the title to issue, and this was done on July 2, 1833. Was this proceeding effectual to convey title; or, in other words, does it constitute in the present petitioner a title lawfully and regularly derived?

It has been said in *Republic* v. *Thorn* (3 Tex., 499; cited in *United States* v. *Coe*, 170 U. S., 686), that the Mexican nation "was not formed by constitutional compact between several separate independent States," and that "in the Mexican union the general government claimed originally the property in the public domain."

It follows as a necessary corollary from this that the only power of disposition of public land which the several States could exercise subsequently was that conceded to them by the nation.

If the theories of the State officials as to the rights of Ignacio Ortiz in the land here sued for are to be accepted, the nation at the date of the Mexican independence succeeded to the legal title to the land but burdened with a perfect equity thereto inhering in Ignacio Ortiz or his heirs. This being the case, the subsequent transfer to the State of the right to sell public land within its limits did not carry such lands for the reason that they were not public lands in the

sense in which that term is used throughout the Mexican legislation. In other words, the duty of divesting itself of a naked title and investing such in the parties entitled thereto belonged to the national Government at the date of this grant, and in that view of the matter the present proceeding which was initiated and consummated by State officials was void. If, on the other hand, the land was public domain and thus passed to the State authorities for disposition, subject to the right of the nation to provide at any time other machinery for its disposition, then in 1833 this land was not a subject of sale by the treasurer-general either with or without the concurrence of the governor of the State, but was under the control of the board of sales created by the decree of July 20, 1831. (Reynolds, p. 157.)

This decree or law has been considered and discussed in a number of cases heretofore pending in this court, among them *United States* v. *Coe* (170 U. S., 696; 174 U. S., 579) and *United States* v. *Faxon* (171 U. S., 244). In these cases it was urged on behalf of the Government that by this law the machinery was provided by means of which the Government might sell the property of the nation to raise revenue. This law did not repeal the colonization law of August 18, 1824, this being one for revenue and the other for colonization, yet it was inconsistent with the laws of the State of Sonora, under which the State was attempting to sell property for the purpose of revenue and not for colonization. The fact that this law was in force

in Sonora is recognized by this court in *United States* v. *Coe* (170 U. S., 698, 700), where the words "supreme government," as used in section 126 (Reynolds, p. 158), are construed to mean the National Government, and it is held that the approval of the governor of Sonora was not sufficient to create title; and in the same case, in discussing that law, the Court of Private Land Claims said:

> When the property had been knocked down, a minute or report of the proceedings was to be made and transmitted to the supreme government and the sale could not be carried into effect: that is, the proceedings remained *in statu quo* until the approval of the supreme government was given.

It was similarly said by the Court of Private Land Claims in the case of *Faxon* v. *United States:*

> On the board of sales created under the decree of July 20, 1831, and that of April 17, 1837, alone was this power of disposition conferred, and the strict rules and regulations enacted for the government of those boards in the conduct of such sale precludes the idea that any single officer, although a member of the board, could exercise the power.

In the same case on appeal (171 U. S., 244, 252, 257), these regulations are discussed, and it is said by the court, speaking through Chief Justice Fuller (p. 258):

> While these various laws are rather confusing in their number and minuteness, nothing is clearer than that the power to make sales

> and grants was vested in the Treasury Department of the nation, and governed by strict rules and regulations, none of which contemplated that any single officer could make the sales. It is enough that the departmental treasurer did not possess the power, acting singly and on his own responsibility, to conclusively determine to what class lands belonged and their value, and having decided these points, thereupon to exercise the sole power of sale.

The law just quoted is, it is respectfully submitted, controlling of the present case. At the time of this attempted alienation by the treasurer-general upon the authority of the governor of Sonora, neither had the power to alienate public land for the reason that the decree of July 20, 1831, confided that power to a board of sale convoked in each instance under specific authority from the National Government, and constituted as provided in the law just cited. Even though the lands here disposed of were not the subject of revenue, being apparently granted in satisfaction of a preexisting national obligation, that fact rather increases than diminishes the force of the contention that it was a matter not for the local authorities, but for the National Government to attend to through the instrumentality of its board of sales. Certainly to countenance in an officer not generally possessed of the right to dispose of land the power to dispose of it under certain conditions and also the power to decide when such conditions arise would practically invest him with unlimited jurisdiction in the matter: and to say that the treasurer-general could make titles to land

whenever he and the governor decided a proper case existed was in effect to give them concurrent jurisdiction with the board of sales, which it can not for a moment be contended was the fact. This very proposition was ruled by this court in the Faxon case just quoted, where it was held that the departmental treasurer did not possess the power to conclusively determine to what class lands belonged and thereupon to exercise the sole power of sale. If sections 27 and 28 of the Sonora law of May 20, 1825, cited in these papers, can be considered as referring to rights other than those initiated by the State (which it is respectfully submitted it did not), certainly its provisions were superseded by the law of July 20, 1831, which was a resumption by the nation of the power to deal with its lands, and even if the treasurer-general could be considered after the enactment of the last law the officer to execute such formal titles, it is very evident that the "government" from which he must thereafter derive his authority to do so was not the governor, the official who was consulted in this case, but the National Government, acting either directly or through its board of sales.

Nor can it be contended that, rejecting the act of the State officials in extending this title, this grant is still entitled to confirmation on the ground that those officers found a perfect equity to belong to the Ortizes. The adjudication of these officials is as lacking in effect as was their extension of title. If they had no power as executive officers to grant away the nation's lands, even less did they have the power

to adjudicate it away, especially when it is recalled that this was a proceeding to which the nation was no party. Divesting this record, therefore, of the acts of these State officers, which for the reasons just stated were void, all that remains in the record, outside of the oral testimony above discussed as to the location of the natural objects, is the testimony presented to the treasurer-general, consisting of the three affidavits taken before the alcalde in 1833 and the certificate of payment by their father in 1812. There is not a vestige of testimony in the record outside of these affidavits to fix the boundaries or to show any substantial possession or claim of ownership by either the plaintiff or its predecessor in title. It will hardly be contended that these *ex parte* statements were of any probative force against the Mexican nation, or that they are of any force against its successor, the United States. To hold this would be to ignore every principle upon which courts proceed the world over in the admission of testimony.

IV.

THE GRANT HERE ASSERTED WAS NOT LOCATED OR DULY RECORDED AS REQUIRED BY THE GADSDEN TREATY.

If this be construed to be a grant of 2 sitios within the larger tract described by the witnesses of 1833, it is, for the reasons stated in the briefs for the Government in the cases of *United States* v. *Green* and *Christie* v. *United States* (109 and 129, present term), a grant that was not located at the date of the treaty. A repetition here of all the considerations there urged would

seem unnecessary in view of the fact that this case will, it is anticipated, be submitted to the court for its consideration at the same time as the cases just named. If, on the other hand, this be construed to be a grant to the outboundaries, wherever they are, it is still not located, as it does not appear from the record that an authentic survey was ever made of the grant, which, under the decision of this court in *Ainsa* v. *United States* (161 U. S., 208) and *Ainsa* v. *New Mexico and Arizona Railroad* (175 U. S., 76, 85), was essential to the proper "location" of a grant under the provisions of the Gadsden treaty.

Is this grant "duly recorded" in the archives of Mexico, as required by article 6 of the Gadsden treaty?

Absolutely the only reference to this grant in the archives is the toma de razon, made in the proper book, but on a page other than that stated on the titulo, said toma de razon being as follows (R., 69):

> On the 12th day of July there was delivered to Capt. Don Ignacio Elias Gonzales the grand title issued on the 2d of July of the current year for 2 sitios of land for raising cattle and horses, which is comprised in the place called Aribac, situate in the jurisdiction of the upper Pima country, in favor of citizens Tomas and Ignacio Ortiz, residents of the presidio of Tubac.
>
> MILLA.

Was this a sufficient record of the grant? The court below was divided, a majority being of the opinion that it was a sufficient compliance with the terms of the treaty. It is respectfully submitted,

however, that the opinion of Chief Justice Reed (R. 70) states the law of the case in holding that the presence of the expediente in the archives was necessary to a complete "record." As was said in the brief for the United States in the Ainsa case—

> A proper construction of this provision of the treaty requires that the existing state of the law should be considered; that is to say, the laws of the country in which these records or archives were to be found. It is well known as a matter of history that the manner of preserving records of grants and other important instruments in Spain and Mexico was different from that which obtains in this country, and that the customary manner of preserving records of proceedings leading up to a grant in Mexico was to deposit the original in the archives and to give to the proper party a copy of such original, which was known as the testimonio, duplicate, or second original. There was also a requirement that a memorandum of the grant should be entered in the proper book, called "Toma de Razon," and when a history of the original proceedings (*expediente*) was properly deposited in the archives and a minute of the grant entered in the "Toma de Razon" this constituted a record of the grant, and when these two steps had been taken the grant had been "duly recorded" as provided by the treaty, and until both these steps had been taken the grant had not been "duly recorded."

It seems unnecessary as showing what is meant by a "record" to do more than to cite the court to the long line of California cases, beginning with *Fuentes* v. *United*

States (22 How., 443) and running down to *Peraltas' case* (3 Wall., 434). In *Luco's case* (23 How., 515) it was held that no grant should be received as genuine by the courts of the United States "unless it be found noted in the archives, or the *expediente* or some part of it be found on file among the archives where other and genuine grants of the same year are found." In *Bolton's case* (23 How., 347) it was held that the record referred to in the regulations of 1828 is "the *evidence* of the grant," and that while the *título* given by the governor "serves among individuals the purpose of evidence," the Government, when it institutes inquiries in reference to the subject, is "entitled to require the production of that official record, which it has prescribed to its officer for its own security and as a necessary condition of a legal administration and as a necessary precaution against fraud." So *Vallejo's case* (1 Black, 541), quoting *United States* v. *Sutter* (21 How., 175), says that "in every well-regulated government the deeds of its officers conveying parts of the public domain are registered or enrolled to furnish permanent evidence to its grantees of the origin of their title." So in the *Peralta case* (3 Wall., 434) it was said:

> But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the Government to ascertain with accuracy what portion of the public lands had been alienated. The record *was the grant*, and without it the title was not divested. The governor was required to give a

> document to the party interested, which was evidence of title, and enabled him to get possession, but his "*título*" did not divest the title unless record was made in conformity with law.

To the same effect are the *Teschmaker case* (22 How., 405), the *Pico case* (22 How., 406), the *Castro case* (24 How., 346), case of *Knight's administrator* (1 Black, 228), *Neleigh's case* (1 Black, 298), *Romero's case* (1 Wall., 743), *White's case* (1 Wall., 660), the *Berreyesa case* (23 Lawyer's Coop. ed., 912), and the more recent cases of *Ortiz* (176 U. S., 422), *Elder* (177 U. S., 104, 118), and *Whitney* (181 U. S., 109).

Perhaps the latest expression from this court on this point is found in *United States* v. *Elder* (177 U. S., 118), where this court, speaking through Mr. Justice White, says:

> The constituents of the preliminary papers leading up to a grant, and of the grant itself, and the distinction between them, to which attention had been so often directed by this court, was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Hinsa* v. *United States* (161 U. S., 208, 219), as follows:
>
> "An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of [or?] final title paper[s] is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant, and property granted."

It is manifest from the foregoing review of

> the decisions under the California act that it was held that, in order to vest an applicant under the regulations of 1828 with title in fee, either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential: it was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record in some form was required to be made of such grant.

In the case of *United States* v. *Castro* (24 How., 349) it is said:

> It is sufficient to say that it [the grant] was required to be in writing, the officers and tribunals before which it was to pass designated, and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be *deposited* and *recorded* in the proper public office among the public archives of the Republic.

The necessity for both *deposit and record* in the public archives is reiterated in *Berreyesa* v. *United States* (154 U. S., 623), cited with approval in *Whitney* v. *United States* (181 U. S., 110).

> The case of *United States* v. *Vallejo* (1 Black, 555), discusses the necessity for both retaining the original in the archives and making a record of the grant, the first being done in all civil law countries, so that parties may secure certified copies thereof, and the other to afford the

government protection against its officers and notice of their actions.

In *Peralta's case* (3 Wall., 434), above cited, which is the leading one on the subject, reference is made to the presence of the expediente in the archives as a part of the record evidence necessary to support the claim.

That the mere *toma de razón*, brief and incomplete as it necessarily was, did not suffice to constitute a full record is shown in the provision of section 9 of the Regulations of November 21, 1828 (Reynolds, 142), where it is provided that not only an entry of "all applications presented and grants made shall be made in a book intended for the purpose," but that there should also be entered "the maps of the lands that shall be granted." (See discussion of this law in *Bolton's case*, 23 How., 350.) In the absence of maps, which were not usually made in the Sonora grants, the policy of the law required that at least the expediente, which embodied the field notes of the survey and a description of the property, should be retained in the archives so that in connection with the *toma de razón* entry the Government or its successor in sovereignty should have the full facts as to the land to which title had been given. The testimony of Bonillas (R., 16) shows the practice in Sonora as to the record. The purpose of the provision in the treaty was evidently that the United States might know what it was getting and might not run the risk of being confronted with claims of which the Mexican archives did not give it full notice. Did the

brief *toma de razón* in this case accomplish that purpose? When it is recalled that, that entry does not give a description of the property, but simply refers generally to its situs in terms so general that Bonillas admits (R., 15) that he would have been unable to locate it but for the contents of the *título*, it would seem that such entry was hardly enough to satisfy the spirit and intent of the treaty. Indeed, the treasurer-general himself in issuing this title (R., 24) states in terms what shall constitute the record when he provides that the expediente remains in the archives of his office as "a perpetual record." Where is the expediente of 1833 to which he thus refers, and the expediente of 1812, which presumably contains the full details of the original transaction? Certainly claimants are under obligations to produce or to account for the nonproduction of what is solemnly declared by their own titles to be the "perpetual record" of its issuance.

The case of *United States* v. *Osio* (23 How., 279, 280), cited by claimant, is not, it is believed, controlling upon this question. That was one of the early cases on the subject of "record," and the rule as laid down by the line of cases above cited was made much stricter thereafter, as the enormous possibilities for fraud flowing from the Pico régime in California became more and more apparent; and it is not believed that, that case in so far as it indicates that a mere *toma de razón* in the archives is, without the expediente, a sufficient record is sustained by the later cases. But the very terms of that decision, which requires the

toma de razón to state the number of the expediente, shows that it was contemplated that there would be in the archives an *expediente* to which this entry would be at all times referable. It is further noted that Osio's case provides that the entry shall contain a brief description of the land; the toma de razón here does not measure up to this standard, since, as above pointed out, the land is confessedly incapable of identification except by reading in connection with it the titulo from private hands. The lack of all evidence of possession under this grant, the discrepancy between the page of the tema de razon as produced and the page given in the indorsement on the titulo, and the embodiment in the titulo of requirements as to a fee that was imposed only by a law passed the year following, are all circumstances which call for the strict enforcement in this case of the legal requirement of full archive proof of the grant.

It is respectfully submitted that upon all the grounds herein urged the judgment of the court below rejecting the claim was right and should be affirmed.

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O

Supreme Court of the United States.

No. 153.—October Term, 1901.

The Arivaca Land and Cattle Company, Appellant, vs. The United States et al. } Appeal from the Court of Private Land Claims.

[March 24, 1902.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a petition filed March 1, 1893, for the confirmation of a grant situated in Arizona, containing, according to a survey made on petitioner's behalf, 26,508.06 acres. February 13, 1899, an amended and supplemental petition was filed, praying that if there were found to be an overplus, petitioner should be allowed to pay for such excess and costs, which it offered to do as soon as the same were ascertained, and it tendered $300 in gold as payment for overplus and $200 for costs. The Court of Private Land Claims rejected the grant because there was "such uncertainty as to the land which was intended to be granted that it is impossible now to identify it." Two justices dissented, being of opinion that the claim should be confirmed for two sitios.

A titulo was introduced in evidence, (in the surveyor general's office, produced from private custody,) and this showed that on June 2, 1833, Ygnacio and Tomas Ortiz, asserting themselves to be sons and heirs of one Augustin Ortiz, petitioned the alcalde of Tubac, stating that in 1812 their deceased father paid into the treasury of the capital of Arispe seven hundred and forty-seven dollars and three reals, as the highest bid, for which two sitios of land for raising cattle were sold to him at public auction in the place called Aribac, and that they were "ignorant as to who was the surveyor or where the expediente containing the measurements, appraisement and auctions is now," and asking that the depositions of three witnesses be taken as to the settlement and possession of the land from 1812 and the landmarks and boundary lines. The alcalde proceeded to take the depositions of three witnesses, who deposed in substance that the Aribac ranch had been settled and occupied by Ortiz and his sons from 1812 to that time, and that the landmarks were "the one towards the north on the high pointed hill (devisadero) that rises on this side of the Tagito mine and borders on the Sierra de Buenavista; the one towards the south standing on this side of the Longorena mine on a low

hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra del Babuquivari." These depositions were taken *ex parte*, no representative of the government having been notified or participating.

Ygnacio and Tomas then petitioned the treasurer general of Sonora to issue them a grant, "the original expediente containing the measurements having perhaps been lost," transmitting "the documents by which they show their right of property to two sitios of land for raising cattle, which in the year 1812 were sold at public auction to their deceased father, Don Agustin Ortiz, from whom they inherited the same, which land is situated in the place called Aribac, and that the price at which it was sold and other imposts thereon have been paid." Besides the depositions, the titulo set forth a certificate by the treasurer of Arispe, dated June 18, 1833, to the effect that "on page 85 of the manual book corresponding to the year 1812," an entry was found, under date of October 10, signed by Bustamente, Romo and José Carrillo, that Don Agustin Ortiz by Carrillo, as his attorney, had paid into the royal treasury seven hundred and ninety-nine dollars, five reals, and nine grains, for two sitios of land for raising cattle recently sold to him at auction. The petition of the alcalde, his order to take testimony, the three depositions, the certified entry, and the petition to the treasurer general, were then referred by the latter to the governor of Sonora for action. The governor, reciting that "the possessory right of citizens Tomas and Ygnacio Ortiz has been legally proved," ordered that the grant be made in accordance with the law. June 24, 1833, Mendoza as treasurer general of Sonora directed that the grant for two sitios of land for raising cattle which comprise the place called Aribac, be issued, and that the grantees pay into the treasury the value of the title in conformity with the laws, which was apparently done; and Mendoza issued the grant "of two sitios of land for raising cattle and horses, which comprise the place called Aribac," and declared that the expediente should remain in the archives of the office "as a perpetual record." On the titulo was endorsed: "This title is recorded on page 15 of the proper book which exists in this treasury general;" and also the certificate of the entry in the manual book of July 12, of the receipt of $30 as the value of the land title for two sitios of land. The petitioner also introduced the following entry in the book of Toma de Razon in the office at Hermosillo, Sonora: "On the 12th of July there was issued to Captain Don Ygnacio Gonzales the title granted on the 2d of July, of the corresponding year, to two sitios of land for raising cattle and horses, which comprise the place named

Aribac, situated in the jurisdiction of Pimeria Alta, in favor of the citizens Tomas and Ygnacio Ortiz, residents of the presidio of Tubac."

The expediente of 1812 was not in the archives; the alleged entry of October 10, 1812, copied in the titulo, was not there; the expediente of 1833 was not there; no survey was there. The entry of October 10, 1812, stated that the two sitios comprised "the old and depopulated town or settlement called Aribac." The depositions gave as landmarks "the one towards the north on the high pointed hill that rises on this side of the Tagito mine and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it and borders on the Sierra de las Cabaleras; and the one towards the west boundary standing at the Punta de Agua on a pointed hill opposite the Sierra del Babuquivari."

We have carefully examined and considered the testimony in respect of these descriptive calls given on the trial, and concur in the judgment of the court below that the land cannot be so identified as to admit of confirmation. We are constrained to conclude that adequate certainty is lacking. Not only so in respect of the outboundaries, but this was a grant by quantity, a grant of two sitios only, and where situated in the larger area claimed cannot be satisfactorily determined. The record contains no original survey or field notes; and there is no certainty as to an initial point or center.

It appears that a preliminary survey of two sitios was made in 1881 for the surveyor general of Arizona, but we think from the evidence of the surveyor who made it that his location of the tract was essentially arbitrary. Indeed, he admitted that his survey "did not pretend to conform to the natural objects called for," and testified: "I surveyed the two leagues of land. It was left a good deal to me. They wanted it for cattle raising in that valley. I used my own judgment as to where to locate it."

But the court was not called on to speculate on the subject or to accept the theories of the surveyor as to the best place for cattle raising as controlling. The doctrine of the *Ely case*, 171 U. S. 220, was not that it was within the power of the court to locate grants, but that if a location had been made, and there were facts enough to nail it to the ground, and determine its true boundaries, that might be done. The data did not exist here for the application of that principle.

The Gadsden treaty provided that grants made previously to September 25, 1853, were not to "be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico." We are of opinion that this grant of two sitios is not shown, and cannot be presumed, to have been located within the intent and meaning of the treaty.

No question, therefore, could be raised in respect of *demasias*, and, moreover, as just held in *Reloj Cattle Company* v. *United States*, *ante*, p. ——, under the laws on that subject, the owner of the *cabida legal* did not have a vested property interest in the *demasias*, but, under circumstances, had the preference in acquiring it, if he so desired; and claims to overplus, the conditions to acquiring which were unperformed, were not open to confirmation by the court.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.